Supreme Court, U.S.
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No. 10-

IN THE

Supreme Court of the United States

ROLAND JOHNSON,

Petitioner,

v.

JOHN E. POTTER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

When this case was last before it, this Court ruled that the United States Court of Appeals for the Second Circuit failed to give full retroactive effect to the Supreme Court's decision in *Burlington Northern & Sante Fe Railway v. White*,[1] which created a new standard for determining adverse employment action in Title VII retaliation cases, when it denied Petitioner's Petition for Rehearing *En Banc* on November 29, 2006 while Petitioner's case was still open on direct review as to whether Petitioner plead that he suffered an adverse employment action in his Title VII retaliation lawsuit. On June 25, 2007, the Court remanded the case to the United States Court of Appeals for the Second Circuit "for further consideration in light of *Burlington, N. & S. F.R. Co. v. White*, 548 U.S. __ (2006)." Notwithstanding, on August 10, 2007, the Second Circuit remanded the case to the District Court for the Western District of New York "for further proceedings consistent with the order of the United States Supreme Court." On remand, the District Court, after waiting two years after this Court granted certiorari, and only when prompted by a Petition for Writ of Mandamus for failure to exercise jurisdiction for an undue amount of time, failed to follow this Court's directive in its July 22, 2009 decision. Instead, it adhered to the judgment this Court had vacated. That decision was appealed to the Second Circuit ,who, on September 30, 2010, also failed to follow this Court's directive, and adhered to the judgment of the District Court.

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1. 548 U.S. 53, 126 S. Ct. 2405, 165 L.Ed. 2d 345 (2006) (hereinafter referred to as "*Burlington Northern*").

The question presented is:

1. Whether, upon remand, the Court of Appeals for the Second Circuit and the District Court properly considered this case in light of *Burlington Northern*.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	iii
TABLE OF APPENDICES	vi
TABLE OF CITED AUTHORITIES	vii
OPINION BELOW	3
STATEMENT OF JURISDICTION	3
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	4
STATEMENT OF THE CASE	4
B. The Proceedings Below	12
1. The September 16, 2005 District Court Decision	12
2. The June 7, 2006 Second Circuit Court of Appeals Decision	12
3. The June 22, 2006 Decision of *Burlington North & Santa Fe Railway Co. v. White*	12
4. The July 19, 2006 Petition for Rehearing and For Rehearing *En Banc*	13

Table of Contents

Page

5. United States Supreme Court's June 25th, 2007 Grant of Certiorari 13

6. Second Circuit's August 10th, 2007 Order 13

7. District Court's September 5th, 2007 Decision 14

8. Further Proceedings 14

9. Petitioner's June 21, 2009 Petition for Mandamus 14

10. The District Court's July 21, 2009 Decision and Order 15

11. The Appeal to the Second Circuit ... 15

12. The Decision of the Second Circuit ... 16

SUMMARY OF ARGUMENT 16

REASONS FOR GRANTING THE PETITION 17

I. THE SECOND CIRCUIT COURT OF APPEALS AND THE DISTRICT COURT FAILED TO COMPLY WITH THIS COURT'S DIRECTIVE 17

Table of Contents

Page

1. The District Court Sidestepped the Mandate 18

2. The Second Circuit Sidestepped the Mandate 20

II. THE DECISION BELOW CANNOT BE RECONCILED WITH PREEXISTING SECOND CIRCUIT PRECEDENT 22

III. THIS COURT SHOULD DIRECT THE DISTRICT COURT TO PERMIT PETITIONER TO PROCEED TO DISCOVERY 30

CONCLUSION 31

TABLE OF APPENDICES

APPENDIX A — UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT SUMMARY ORDER 1a

APPENDIX B — DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK DATED JULY 21, 2009 ..... 6a

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NEW YORK DATED SEPTEMBER 5, 2007 FILED SEPTEMBER 6, 2007 ..... 48a

APPENDIX D — SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED AND FILED JUNE 7, 2006 ..... 50a

APPENDIX E — DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK, DATED SEPTEMBER 16, 2005 ..... 55a

TABLE OF CITED AUTHORITIES

Page

CASES

Briggs v. Pennsylvania R.R. Co.,
334 U.S. 304, 68 S.Ct. 1039, 92 L.Ed. 1403
(1948) 18, 20

Burlington Northern & Santa Fe Railway Co. v. White,
548 U.S. 53 (2006) ..... *passim*

Consolo v. Federal Maritime Comm'n,
383 U.S. 607 (1966) 30

Francis v. Franklin,
471 U.S. 307 (1985) 21

Galabya v. New York City Bd. of Educ.,
202 F.3d 636 (2d Cir. 2000) 12, 13, 25

Hicks v Baines,
2010 U.S. App. LEXIS 2146
(2d Cir. February 2, 2010) 22, 29

In re Ivan Boesky Securities Litigation,
957 F.2d 65 (2d Cir. 1992) 18

In re Sanford Fork & Tool Co.,
160 U.S. 247 (1895) 17

Johnson v. Frank, et al.,
90-CV-07138 (CJS) 5, 26

Cited Authorities

Page

Johnson v. Potter
04_CV_6239 (CJS) ..... *passim*

Jute v. Hamilton Sunsdstrand Corp.,
420 F.3d 166 (2d Cir. 2005) 23, 24

Lyons v. England,
307 F.3d 1092 (9th Cir. 2002) 23

Stanton v. Stanton,
429 U.S. 501 (1977) 16

Velikonjo v. Gonzales,
465 F.3d 122 (D.C. Cir. 2006) 29

Yates v. Aiken,
484 U.S. 211 (1988) 16, 20, 21

Zelnick v Fashion Inst. of Tech.,
464 F.3d 217 (2d Cir. 2006) 23

STATUTES

28 U.S.C. § 1254(1) 3

28 U.S.C. § 2106 30

42 U.S.C. § 1983 23

42 U.S.C § 2000 5

42 U.S.C. § 2000e 4

Cited Authorities

Page

42 U.S.C. § 2000e-3(a) 4

42 U.S.C. § 2000e-5(e)(1) 24

29 C.F.R. § 1614.605 8

Fed. R. Civ. P. 12(b)(6) 25

Fed. R. Civ. P. 15 (a) 8

Fed. R. Civ. P. 56 ..... 25, 26

Fed. R. Civ. P. 56 (f) 11, 19

Fed. R. Civ. P. 60 (b)(5) 2, 14, 16

OTHER CITED AUTHORITIES

Title VII of the Civil Rights Act of 1964 ..... *passim*

Petitioner sought rehearing *en banc* pursuant on or about July 19, 2006 from the denial of an appeal dated June 7, 2006. The appeal was taken from a judgment of the United States District Court for the Western District of New York (Siragusa, J.), filed September 27, 2005, upon a Decision and Order filed on September 16, 2005, granting respondent's pre-discovery Motion to Dismiss pursuant to Rule 12(b)(6) on the basis that Petitioner failed to proffer evidence in admissible form to demonstrate a prima facie case of adverse employment action. (App. 88a). The basis for the request for rehearing on July 19, 2006 was that the United States Supreme Court had issued it's decision in *Burlington Northern* on June 22, 2006, unanimously creating a new standard for determining "adverse employment action," and for which Petitioner was entitled to have applied retroactively. Petitioner's request for rehearing was denied on November 29, 2006.

On June 25th, 2007, the United States Supreme Court granted certiorari to Petitioner. The judgment of Second Circuit was vacated, with costs, and the case was remanded to the United States Court of Appeals for the Second Circuit "for further consideration in light of *Burlington, N. & S. F.R. Co. v. White*, 548 U.S. __ (2006)."

On August 10th, 2007, the Second Circuit issued an Order that vacated the judgment of the District Court of Western New York and remanded the case to the District Court for further proceedings consistent with the order of the United States Supreme Court's decision.

On September 5th, 2007, United States District Court Judge Charles J. Siragusa issued an Order that stated

> ..if they wish to do so, the parties may each file and serve a memorandum of law, addressing the effect of the *Burlington Northern* decision on defendant's summary judgment motion, on or before October 5, 2007. (App. 49a).

The Court further ordered that it would "decide whether to schedule oral argument." On October 26th, 2007, Petitioner filed a Motion for Reconsideration and Memorandum pursuant to Rule 60(b)(5). On January 23rd, 2008, the District Court determined that it would not hear oral argument and would issue a written decision at "its earliest opportunity."

For the following twenty months, the District Court failed to issue a written decision. Two years after the Supreme Court has granted certiorari, a Petition for Mandamus was filed with the Second Circuit Court of Appeals setting forth that the District Court ignored the Second Circuit mandate for an excessive and undue amount of time, and that the undue delay was tantamount to a failure to exercise jurisdiction, and as such, the District Court had abused its discretion.

While the Petition for Mandamus was pending, Judge Siragusa issued his Decision and Order on July 21, 2009. (App. 6a-47a). While the decision cited *Burlington Northern*, and while Judge Siragusa claims that he "considered the various motions in light of *Burlington Northern*," the decision is totally devoid of the proper inquiry that Judge Siragusa was directed to undertake, i.e., "whether the employer's actions [were] harmful to the point that they could well dissuade a

reasonable worker from making or supporting a charge of discrimination." *Burlington Northern*, 548 U.S. at 57. Judge Siragusa failed to consider whether Potter's actions dissuaded Petitioner from making further claims of discrimination in the workplace. Instead, the Court merely recited the same basis for dismissing the case initially. (App. 6a-47a).

Petitioner filed a Notice of Appeal on August 14, 2009, arguing that the District Court abused its discretion for failing to follow the mandate of the Second Circuit on remand.

On the 30th day of September, 2010, the Second Circuit affirmed the District Court's July 21, 2009 decision in its entirety without once mentioning "whether the employer's actions [were] harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination." *Id.* (App. 1a-6a).

OPINION BELOW

The opinion of the United States Court of Appeals for the Second Circuit (App. 1a-6a) is reported at 09-3484-cv (2d Cir. September 30,2010). The memorandum decision of the District Court (App. 6a-47a) is reported at 04-CV-6634 CJS.

STATEMENT OF JURISDICTION

The judgement of the United States Court of Appeals was issued the 30th of September, 2010. This Court has jurisdiction over this petition under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This action arises under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C.§ 2000e, *et seq.*

STATEMENT OF THE CASE

This case is about whether Petitioner adequately alleged he suffered an "adverse employment action" under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a), which prohibits employers from discriminating against workers in retaliation for certain conduct. In this regard Section 704(a) provides that: "[i]t shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." *Id.*

Petitioner commenced this action against the respondent on December 29, 2004, upon receipt of two Notices of Right to Sue dated December 17, 2004, and December 22, 2004. In his complaint, Petitioner claimed several acts of retaliation under Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. §2000e et. seq., culminating in a retaliatory constructive discharge, and that Petitioner suffered a constructive discharge based on cumulative events.

In or about November 26, 1991, petitioner filed his first suit against respondent claiming discrimination and

retaliation under Title VII. See *Johnson v. Frank, et al*, 90-CV-07138 (CJS). (hereinafter "*Johnson I*") which eventually went to trial before the Honorable Charles J. Siragusa on November 24 of 1998, pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C §§2000, *et. seq.*, in Federal District Court for the Western District of New York.

The issues at the November 1998 trial centered on petitioner's claim that respondent had demoted and denied him promotional opportunities in retaliation for prior protected activities by seeking to unilaterally abolish Petitioner's position as a Window Clerk in the Box Section. The parties settled the matter two days into trial.

Petitioner resumed work with the as a Claims and Inquiry Clerk, PS-5 level, a position he had successfully bid on in or about September 1998.

On January 15, 2002, Petitioner filed his second civil lawsuit in the Western District of New York, *Johnson v. Potter*, 04-cv-6239 (CJS)(hereinafter "*Johnson II*"), alleging retaliation after completion of his civil trial in 1998.

On April 8, 2003, Petitioner filed an Amended Complaint alleging continuing retaliation. On April 21, 2003, while *Johnson II* was pending, Petitioner filed a formal complaint with the EEO, (EEO case no. 4B-140-0036-03), claiming the following acts of discrimination based on disability (Diabetes Type II, anxiety disorder, and hypertension) and prior EEO activity:

1. Falsification of time by Maryann Molenda, Manager of Consumer Affairs & Unknown Members of the Attendance Control Office;

2. A continuing pattern of discriminatory harassment and retaliation by Laura Lewis, Manager of Marketing , Diane Mineo, manager of the Business Service Network, Mary Tarzia, Human Resource Specialist;

3. Continuing pattern includes failure to promote.

On May 12, 2003, discovery in *Johnson II* concluded.

On June 21, 2003, Petitioner filed a formal complaint with the EEO (EEO case no. 4B-0043-03), claiming the following based on race, disability and retaliation for having engaged in prior EEO activity:

> "During a May 14, 2003 closed-door meeting with marketing manager Laura Lewis, she referenced prior EEO activity, verbally threatened me, my job, and attempted to change the duties of my job, after I refused to discuss her unwelcomed behavior (of a sexual nature) which was presented to her via certified mail."

On August 15, 2003, Petitioner resigned from his position with the Post Office, claiming he was constructively discharged.

On September 4, 2003, Petitioner sought to have the above named EEO cases, 4B-140-0036-03 and 4B-140-0043-03 amended to add a claim of "constructive discharge" stating the following:

> This is a request to amend the above cited complaints to include a "constructive discharge" claim after learning on August 13, 2003 and August 14, 2003 that an involuntary deduction of $6808.00 taken by the Postal Service to pay my creditors during my 1998 civil trial has not been paid.[1] The callous and outrageous and intolerable treatment & working conditions I was FORCED to quit because of the persistent harassment and the callous and outrageous [treatment].

Historically, Petitioner had amended his EEO complaints on numerous occasions with no difficulty. On September 5, 2003, Respondent informed Petitioner that he had to specify *which* EEO complaint he sought to amend within ten (10) days.

On September 13, 2003, via certified mail, Petitioner informed respondent of the following:

> This is a request to amend the above cited complaint specifically EEO case # 4B-140-0043 to include a "constructive discharge" claim. This comes after persistent

1. Potter produced an affidavit resolving this matter for the first time in their response to Johnson's Motion for Summary Judgment in *Johnson II*.

> management harassment and a 8/13/03 & 8/14/03 revelation that an "involuntary deduction" of $6408.00 by the agency to pay my creditors during a 1998 civil trial has not been paid.

Petitioner heard nothing else from respondent with regard to his amendment to EEO complaint 4B-0043-03 , and presumed it was duly amended as it had been in the past.

On September 25, 2003, ten (10) days after receipt of petitioner's *second request* to amend EEO complaint no. 4B-0043-03 on September 15, 2003, respondent informed petitioner that it would cease investigation of the constructive discharge claim, and issued a "Notice to File a Mixed Complaint" with the MSPB, despite the fact that Petitioner had already elected to proceed with the EEO when he filed his September 4, 2003 EEO complaint.

It should be noted that the September 25, 2003 letter was **not** mailed via certified mail to petitioner as respondent had done in the past. Instead, it was sent to Petitioner's counsel solely, in total contradiction to well established policies regarding sending such notice via certified mail, and policies regarding notice pursuant to 29 CFR §1614.605.

In or about May 14, 2004, Petitioner filed for summary judgment in his civil lawsuit and also moved to amend his complaint pursuant to Rule 15(a) to add the claim of "constructive discharge" as being reasonably related to the claims at bar for the sole

purpose of having all the claims heard together at one time, since no Notice of Right to Sue had been issued by the EEO on petitioner's claims of retaliation and constructive discharge since they were filed in May, June and September of 2003.

The District Court declined to permit petitioner leave to amend his complaint on September 16, 2005. The denial of leave permitting petitioner to amend his complaint to add the claim of constructive discharge was not on the merits of the amended complaint. Rather, the lower court acknowledged that the deadline for amending the pleadings in *Johnson II* was December 12, 2002, and that Petitioner's constructive discharge did not occur until August 15, 2003, over a year later, and months after the close of discovery in *Johnson II* on May 12, 2003. Yet, the lower court determined that there was no "good cause" for the delay between petitioner's constructive discharge of August 15, 2003, and his motion to amend the complaint on May 14, 2004, further noting that if petitioner's constructive discharge claim was not at that time administratively exhausted, then it was "not properly the subject of a motion to amend."

On December 17, 2004, Petitioner received two Notices of Right to Sue with regard to EEO complaint 4B-140-0036-03 & complaint 4B-0043-03. However, Respondent failed to amend Petitioner's EEO complaint 4B-0043-03 to include his charge of constructive discharge.

On December 29, 2004, Petitioner filed his third complaint, the instant matter (hereinafter *Johnson III*),

with the United States District Court, Western District of New York, 04-cv-6634(CJS), alleging retaliation and retaliatory constructive discharge, outlining the entire course of Appellee's conduct since Petitioner's 1998 civil trial.

While the factual background underlying Petitioner's second and third complaint is essentially the same, they are not identical: Petitioner included several new allegations in his third complaint. These actions, including the background evidence contained in the complaint, *cumulatively* led to Petitioner's allegation that he was constructively discharged .

On February 29, 2005, the lower court dismissed the complaint in *Johnson II*, determining that Petitioner was not subject to any adverse employment action.

On March 2, 2005, Petitioner filed an Amended Complaint in *Johnson III*.

On March 14, 2005 Respondent accepted service of Petitioner's Amended Complaint. A month later, prior to filing its answer, respondent filed a Motion to Dismiss and for Summary Judgment on April 27, 2005, alleging petitioner failed to:

1) exhaust his administrative remedies because he did not file a formal complaint with regard to his claim of constructive discharge;

2) failed to file a timely claim for constructive discharge because he had gone out on

disability leave a month earlier, and should have filed his complaint when he went out on disability leave;

3) that regardless of whether Petitioner' claim for constructive discharge is timely or not, it is barred by collateral estoppel; and,

4) that Petitioner cannot establish his *prima facie* case of retaliation.

In response, Petitioner filed a Cross Motion seeking a Continuance of Discovery pursuant to Rule 56(f), and tendered a comprehensive Rule 56(f) Affidavit setting forth the (1) identity of the probable facts not available and their relevance; (2) an explanation of why facts precluding summary judgment cannot be presented; and (3) a specific statement on how the desired time would enable Petitioner, the non-moving party in the instant matter, to meet its burden in opposing respondent's Motion for Summary Judgment.

On September 16, 2005 the lower court granted respondent's Motion to Dismiss and for Summary Judgment, and denied Petitioner's Cross Motion for a Continuance of Discovery pursuant to Rule 56(f), claiming that no discovery was necessary and that Petitioner failed to state a prima facie case of retaliation because he could not demonstrate that he suffered an adverse employment action and that he failed to demonstrate that he suffered a constructive discharge.

B. The Proceedings Below:

1. The September 16, 2005 District Court Decision

On September 16, 2005 the lower court granted Respondent's Motion to Dismiss and Motion for Summary Judgment, and denied Petitioner's Cross Motion for a Continuance of Discovery pursuant to Rule 56(f), claiming that no discovery was necessary and that Petitioner failed to state a *prima facie* case of retaliation and constructive discharge. (App. 55a-91a).

2. The June 7, 2006 Second Circuit Court of Appeals Decision

On June 7, 2006, the Second Circuit determined that Petitioner failed "to state a *prima facie* case of adverse employment which is necessary to any claim of retaliation under Title VII." citing the Second Circuit's decision in *Galabya v. New York City Bd. Of Educ.*, 202 F.3d 636, 640 (2d Cir 2000), which held "a plaintiff sustains an adverse employment action if he or she endures a 'materially adverse change' in the terms and conditions of employment."

3. The June 22, 2006 Decision of *Burlington North & Santa Fe Railway Co. v. White*

On June 22, 2006 this Court unanimously decided the case of *Burlington North & Santa Fe Railway Co. v. White*, 126 S. Ct. 2405 (2006), which established that the "materially adverse" standard to be judged objectively through the eyes of a reasonable employee in the Plaintiff's position and dependent upon the

circumstances of each particular case, thus superceding the standard employed by the Second Circuit, *inter alia*, for determining adverse action as set forth in *Galabya, supra.*, i.e., that the standard to be used is whether there was a "materially adverse change to the terms and conditions of employment."

4. The July 19, 2006 Petition for Rehearing and For Rehearing *En Banc*

On July 19, 2006, while still on direct review, a petition for rehearing and rehearing *en banc* was submitted to the Second Circuit setting forth the new standard enunciated in *Burlington Northern* as the basis for the request for rehearing. The Second Circuit denied the petition for rehearing and rehearing *en banc*, despite this Court's intervening decision in *Burlington Northern*, and the fact that Petitioner's case was still open on direct review.

5. United States Supreme Court's June 25th, 2007 Grant of Certiorari

On June 25th, 2007, the United States Supreme Court granted Petitioner's Petition for Writ of Certiorari. The judgment of Second Circuit was vacated, with costs, and the case was remanded to the United States Court of Appeals for the Second Circuit "for further consideration in light of *Burlington, N. & S. F.R. Co. v. White*, 548 U.S. __ (2006)."

6. Second Circuit's August 10th, 2007 Order

On August 10th, 2007, the Second Circuit issued an Order that vacated the judgment of the District Court

of Western New York and remanded the case to the District Court for "further proceedings consistent with the order of the United States Supreme Court's decision."

7. District Court's September 5th, 2007 Decision

On September 5th, 2007, Judge Siragusa issued an Order that stated

> ..if they wish to do so, the parties may each file and serve a memorandum of law, addressing the effect of the *Burlington Northern* decision on defendant's summary judgment motion, on or before October 5, 2007. (App. 6a-47a).

The Court further ordered that it would "decide whether to schedule oral argument" (App. 48a-49a).

8. Further Proceedings

On October 26th, 2007, Petitioner filed a Motion for Reconsideration and Memorandum pursuant to Rule 60(b)(5). On January 23rd, 2008, the District Court determined that it would not hear oral argument and would issue a written decision at "its earliest opportunity."

9. Petitioner's June 21, 2009 Petition for Mandamus

For the following twenty months, the district court failed to issue a written decision. Two years after the

Supreme Court has granted certiorari, a Petition for Mandamus was filed with the Second Circuit Court of Appeals setting forth that the District Court ignored the Second Circuit mandate for an excessive and undue amount of time, and that the undue delay was tantamount to a failure to exercise jurisdiction, and as such, the District Court had abused its discretion.

10. The District Court's July 21, 2009 Decision and Order

While the Petition for Mandamus was pending, Judge Siragusa issued his

Decision and Order on July 21, 2009. (App.). Judge Siragusa claims that he "considered the various motions in light of *Burlington Northern*," yet the decision is totally devoid of the proper inquiry that Judge Siragusa was directed to undertake under, *i.e.*, "whether the employer's actions [were] harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination." Judge Siragusa failed to consider whether Respondent's actions dissuaded Johnson from making further claims of discrimination in the workplace. (App. 6a-47a).

Petitioner's Petition of Mandamus was deemed moot by the July 21, 2009 decision.

11. The Appeal to the Second Circuit

Petitioner filed a Notice of Appeal on August 14, 2009.

12. The Decision of the Second Circuit

The decision of the Second Circuit affirms the July 21, 2009 decision of the District Court, but failed to apply the abuse of discretion standard of review with regard to the District Court's denial of Petitioner's October 26th, 2007 Motion for Reconsideration and Memorandum pursuant to Rule 60(b)(5), and failed to apply *Burlington Northern i.e.*, "whether the employer's actions [were] harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination" and instead affirmed the decision of the District Court. (App. 1a-6a).

SUMMARY OF ARGUMENT

The Second Circuit Court of Appeals and the District Court for the Western District of New York has disregarded the instructions of this Court which directed that this case be remanded to the Second Circuit "for further consideration in light of *Burlington, N. & S. F.R. Co. v. White*, 548 U.S. __ (2006)." The District Court for the Western District of New York had no authority to refuse to apply the correct standard under *Burlington Northern* and instead affirmed its earlier decision. Nor did the Second Circuit have the authority to do the same when it affirmed the decision of the District Court. This Court has repeatedly rejected lower court's attempts to skirt its mandates in this manner. See, *e.g.*, *Stanton v. Stanton*, 429 U.S. 501 (1977); *Yates v. Aiken*, 484 U.S. 211 (1988).

REASONS FOR GRANTING THE PETITION

I. THE SECOND CIRCUIT COURT OF APPEALS AND THE DISTRICT COURT FAILED TO COMPLY WITH THIS COURT'S DIRECTIVE

When the Second Circuit and the District Court failed to further consider Petitioner's case in "light of of *Burlington, N. & S. F.R. Co. v. White*, 548 U.S. __ (2006)." , the Second Circuit and the District Court violated the basic precept that this Court's decisions must be scrupulously followed by the lower courts. *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255 (1895) (following a remand from this Court, a lower court is "bound by the decree as the law of the case, and must carry it into execution according to the mandate. The court cannot vary it, or examine it for any other purpose other than execution").

The Court gave clear directions when it remanded the case to the United States Court of Appeals for the Second Circuit "for further consideration in light of *Burlington, N. & S. F.R. Co. v. White*, 548 U.S. __ (2006). " This Court plainly contemplated that on remand the Second Circuit would provide further consideration in light of the new standard set forth in *Burlington Northern* in the context of the experiences of the Petitioner. The Second Circuit failed to do this in the first instance and remanded the case to the District Court where it sat idle for nearly two years, prejudicing the Petitioner. Only upon a Petition for Mandamus for failure to exercise jurisdiction did the District Court take any action with regard to Petitioner's case. The District Court then sidestepped the analysis under

Burlington Northern and simply reinstated its prior decision. That very argument was made to the panel on appeal to the Second Circuit, to no avail. The decision from the Court of Appeals merely parrots the District Court's decision reinstating its prior holding that was vacated, and, as argued below, does not even follow the Second Circuit's prior precedent interpreting *Burlington Northern* in retaliation cases before it.

In this light, reversal is warranted to implement this Court's instructions, and to remind the lower courts of its inherent authority. Under the doctrine of law of the case, a district court may not deviate from a mandate issued by an appellate court, *see Briggs v. Pennsylvania R.R. Co.*, 334 U.S. 304, 306, 68 S.Ct. 1039, 1040, 92 L.Ed. 1403 (1948), and the appellate court retains the right to control the actions of the district court where the mandate has been misconstrued or has not been given full effect, *see In re Ivan Boesky Securities Litigation*, 957 F.2d 65, 69 (2d Cir. 1992).

1. The District Court Sidestepped the Mandate

Here, the Second Circuit apparently did not construe the District Court to have deviated from the mandate of this Court when it affirmed the District Court's decision when it is clear that that is precisely what occurred. Instead of considering Petitioner's case in light of *Burlington Northern*, the District Court's decision focuses instead on whether the claims were barred by res judicata: the District Court claimed that "[p]laintiff made a tactical decision to proceed in the manner that he did in this case, and the Court declines to extend the briefing schedule." (App. 42a). The

District Court also reasons that as to Petitioner's FMLA claim, he "had an opportunity to include that claim in the previous action but chose not to do so. Specifically, Plaintiff was obviously aware of the FMLA incident at the time he amended his complaint in case number 02-CV-6239 on April 8, 2003. Consequently, that claim, as well as all of the claims of retaliation that the Court specifically addressed in the prior action are barred by res judicata." (App. 43a). The District Court further determined that Respondent was entitled to summary judgment on Petitioner's FMLA claims because he did not establish a *prima facie* case of retaliation with regard to: (1) whether he suffered a materially adverse action; (2) that, despite having filed a Rule 56(f) motion, "Plaintiff has come forward with no evidence to refute the affidavit of the FMLA claim administrator, who states that he was unaware of Plaintiff's protected activity when he requested such documentation;" and (3) "[p]laintiff has not come forward with any evidentiary proof in admissible form" that Potter had a legitimate business reason for eliminating Johnson's PS-5 position. (App- 43a). The District Court determined that "since the court has already determined, both in the prior case and in the instant case, that the complained-of actions fail to establish actionable retaliation, Plaintiff's constructive discharge claim based on retaliation must also fail." (App-30-31). Lastly, the District Court determined that it properly granted Petitioner 's Fed. R. Civ. P 56 (f) Cross Motion and Affidavit, because, in sum, the District Court determined that no discovery was necessary:

> ....the Court does not view this case as one in which plaintiff has had no opportunity to

> conduct discovery, but on the contrary, views it as a case where plaintiff has already had a full opportunity to do so. (App.-41a).

All of these arguments make it clear that on remand, the District Court failed to follow this Court's directive and instead adhered to the judgment this Court had vacated.

2. The Second Circuit Sidestepped the Mandate

The case fared no better at the Second Circuit. The decision of the Second Circuit affirms the July 21, 2009 decision of the District Court and fails to apply *Burlington Northern i.e.*, "whether the employer's actions [were] harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination." *Burlington Northern*, 548 U.S. at 57. When it failed to follow the directive of this Court and affirm the vacated order of the District Court, the Second Circuit violated a principle fundamental to the operation of the judicial system, i.e. that the decisions of this Court be followed by the lower courts. *Briggs v. Penn. R. Co.*, 334 U.S. 304, 306 (1948). This Court has not hesitated to reverse lower court rulings that contravene the command of its decisions.

In *Yates v. Aiken*, 484 U.S. 211 (1988), the defendant claimed that the trial court's instructions to the jury were erroneous both as a matter of state law and federal due process. Id. At 212. After the South Carolina Supreme Court denied his habeas petition, Yates sought review from this Court, which vacated the judgment and remanded the case for further consideration in light of

its recent decision in *Francis v. Franklin*, 471 U.S. 307 (1985). On remand, the South Carolina court refused to grant the defendant relief because it believed that none was available under state law. The lower court "did not consider whether the [*Francis*] might apply retroactively" and entitle the defendant to relief under federal law. 484 U.S. at 213. This Court "granted certiorari because [it was] concerned that the South Carolina Supreme Court had not fully complied with [its] mandate, and reversed.

Of relevance here, the Court stated that "[o]ur mandate contemplated that the state court would consider whether, as a matter of federal law, petitioner's conviction could stand in light of *Francis*." *Id.* at 215. This Court went on to decide the question directly: "Since the state court did not decide that question, we shall do so." *Id.* Decisions like this make clear that the Court will not condone the failure of lower courts to comply with its directive on remand.

This Court determined that the United States Court of Appeals for the Second Circuit failed to give full retroactive effect to the Supreme Court's decision in *Burlington Northern* and remanded the case to that Court "for further consideration in light of *Burlington, N. & S. F.R. Co. v. White*, 548 U.S. __ (2006)." Both Courts failed to "consider" Burlington at all and simply sidestepped "whether the employer's actions [were] harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination." *Burlington Northern*, 548 U.S. at 57.

Reversal is warranted, to implement this Court's directive, to follow the standard of law it created and

refined in *Burlington Northern* as it applies to Title VII retaliation cases, and to vindicate the Court's authority.

II. THE DECISION BELOW CANNOT BE RECONCILED WITH PREEXISTING SECOND CIRCUIT PRECEDENT

Echoing the theme that "context matters," the Second Circuit has recently interpreted *Burlington Northern* to hold that Title VII's anti-retaliation provision applies broadly to "employer actions that would have been materially adverse to a reasonable employee or job applicant." *Hicks v Baines* , 2010 U.S. App. LEXIS 2146, *9 (2d Cir. February 2, 2010) quoting *Burlington Northern*, 548 U.S. at 57. As cited in *Hicks*, actions are "materially adverse" if they are "harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination." *Id.* quoting *Burlington Northern*, 548 at 57.

In *Hicks*, this Court identified several principles that follow from *Burlington Northern* that it refused to then apply to the instant case.

First, *Burlington Northern* "announced a different standard" that "extends beyond workplace-related or employment related retaliatory acts and harm." *Id.* (quoting *Burlington Northern*, 548 U.S. at 67).

Second, that *Burlington Northern* requires a showing of material adversity which "protects an individual not from all retaliation, but from retaliation

that produces an injury or harm." *Id.* (quoting *Burlington Northern*, 548 U.S. at 67).

Third, "by considering the perspective of a reasonable employee, *[Burlington Northern]* bespeaks an objective standard." *Id.* (quoting *Burlington Northern*, 548 U.S. at 68-69). The standard may be objective, but "[c]ontext matters." *Id.* (quoting *Burlington Northern*, 548 U.S. at 69).

Fourth, "in determining whether conduct amounts to an adverse employment action, the alleged acts of retaliation need to be considered both separately and in the aggregate, as even minor acts of retaliation can be sufficiently 'substantial in gross' as to be actionable." *Id.* (quoting *Zelnick v Fashion Inst. Of Tech.*, 464 F.3d 217, 227 (2d Cir. 2006)).

Another principle to be considered, according to Second Circuit precedent, is that earlier alleged retaliatory acts may constitute relevant background evidence in support of a timely claim of retaliation. *Jute v. Hamilton Sunsdstrand Corp.*, 420 F.3d 166, 173 (2d Cir. 2005); *see also Lyons v. England*, 307 F.3d 1092, 1101, 1111-12 (9th Cir. 2002).

In *Jute*, the plaintiff was fired from Hamilton in August of 1986. *Jute*, 420 F.3d at 169. Subsequently in 1994 a co-worker brought a claim against Hamilton under Title VII and §1983 to which Jute was listed as a plaintiff's witness and her statement to investigators was made part of the record. *Id.* Immediately after the co-workers case was settled, and Hamilton found out she agreed to testify as a witness for her co-worker, she

began to experience a retaliatory environment which eventually led to her termination in 2000. *Id.* at 169-70. Jute filed a claim with the CCHRO and EEOC on May 18, 2000 thus making her claims of retaliation prior to July 23, 1999 not actionable. *Id.* at 176; *see* 42 U.S.C. § 2000e-5(e)(1) (stating the 180 or 300 day limitations period on which to file a claim after adverse act occurs). Jute's adverse employment actions happened prior to her actionable claims, but the court determined that the pre-actionable conduct, when considered as background evidence, shows a chain of events that arose immediately after her co-workers claim. *Id.* at 177.

Echoing the District Court's determination that "all of the claims of retaliation that the Court specifically addressed in the prior action are barred by res judicata." (App.), the Second Circuit affirmed that decision, despite the fact that those claims that were dismissed by the court in *Johnson II* were plead because they form relevant background evidence of the actions that culminated in Petitioner's constructive discharge and are admissible under *Jute* for that purpose, and for the purpose of demonstrating prior adverse actions.

As in *Jute*, while Petitioner's complaints of *discrete retaliatory actions* in excess of 45 days prior to filing his charge of discrimination are not actionable per se under Title VII, they do serve as relevant "background" evidence to a chain of discriminatory conduct on the part of Potter that support his actionable claims. Accordingly, for the purposes of Title VII, Petitioner's claims stemming as far back as the year he began working for Respondent cannot simply be "divorced" from the record when evaluating his claims for retaliation herein.

In this light, it is clear that the District Court and the Second Circuit failed to consider *Burlington Northern's* impact on Johnson's claims, that is, whether actions taken by Respondent are "harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination." *Id.* quoting *Burlington Northern*, 548 at 57.

While originally submitted as a FRCP 12 (b)(6) motion to dismiss prior to discovery, Respondent also filed for summary judgment pursuant to FRCP 56 on the basis that prior decisions of the Second Circuit, namely *Galabya, supra,* went to the heart of the third element of Petitioner's retaliation claim, and that Johnson could not articulate an adverse employment action that affected the terms and conditions of his employment.

The decision of the Second Circuit, without citing to *Galabya* or any other pre-*Burlington Northern* case, endorses this same pre-*Burlington Northern* reasoning without regard to any of the principles set forth above. In so doing, the Second Circuit ignores the sole consideration under *Burlington Northern:* whether "the employer's actions were harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination." *Burlington Northern,* 548 U.S. at 57.

If the Second Circuit applied a "straightforward" analysis under *Burlington Northern,* then it would be clear that Petitioner stated adverse employment actions in his complaint sufficient for the purposes of FRCP 12(b)(6), and that those claims would eventually be

sufficient to set forth Petitioner's third element of his *prima facie* case pursuant to FRCP 56.

Petitioner plead in his amended complaint by way of background that he had been combating the Post Office since November 26, 1991, when he his first suit against Potter claiming discrimination and retaliation under Title VII. *See Johnson I*, 90-CV-07138 (CJS).

The issues at the November 1998 trial would ironically become the very issues Petitioner would later allege in *Johnson II* and *III*: the claim, *inter alia*, that Respondent had denied Petitioner promotional opportunities in retaliation for prior protected activities by seeking to deny him promotional opportunities and retaliate against him for engaging in protected activity.

No sooner did that matter go trial before Judge Siragusa on November 2-4 of 1998 before Petitioner became subject to further retaliation as a Claims and Inquiry Clerk, PS-5 by his new supervisor, Molenda, who became the subject matter of many of Petitioner's complaints. The acts that Petitioner deemed to be discriminatory from returning after his civil trial in November of 1998 through became the basis of *Johnson II*, wherein he alleged retaliation after resuming work as a Claims and Inquiry Clerk, PS-5 under the supervision of Molenda.

The gravamen of the claimed adverse actions herein occur while *Johnson II* was pending. Specifically, on April 21, 2003, Petitioner filed a formal complaint with the EEO, Case No. 4B-140-0036-03, claiming retaliation for prior EEO activity, as follows:

1. Falsification of time by Maryann Molenda, Manager of Consumer Affairs & Unknown Members of the Attendance Control Office;

2. A continuing pattern of discriminatory harassment and retaliation by Laura Lewis, Manager of Marketing;

3. Continuing pattern includes failure to promote.

On May 12, 2003, discovery in *Johnson II* concluded.

On May 15, 2003, Petitioner filed for informal pre-complaint counseling on the basis that he was subject to ongoing retaliation, sexual harassment and verbal threats about being terminated after he had written a letter to Manager Lewis to "stop harassing" him.

On June 12, 2003, Petitioner filed a formal complaint with the EEO, Case No. 4B-0043-03, claiming retaliation for having engaged in prior EEO activity:

> During a May 14, 2003 closed-door meeting with marketing manager Laura Lewis, she referenced prior EEO activity, verbally threatened me, my job, and attempted to change the duties of my job, after I refused to discuss her unwelcomed behavior (of a sexual nature) which was presented to her via certified mail.

Manager Lewis confronted him about the letter he wrote to her, stating "why don't you be a man and talk about the letter" that she knew what Petitioner's "problem was," that he "was seeing dollar signs" and that it "wasn't going to happen off her career." Manager Lewis said that she used to think very highly of Petitioner ; but that she doesn't anymore. Manager Lewis then began discussing Petitioner's most recent EEO claim against Molenda falsifying his time card; Lewis claimed that she was aware that Petitioner was afraid of losing his job, "but that if anyone were to be fired, [he] would be the first to go."

On August 15, 2003, Petitioner resigned from his position with the Post Office, claiming he was constructively discharged. Petitioner left his long term employment due the unabated retaliatory harassment that he suffered, punctuated by threats of termination by those in management who were aware that he engaged, *historically*, in protected activity.

On September 4, 2003, Petitioner sought to have the above named EEO cases, 4B-140-0036-03 and 4B-140-0043-03 amended to add a claim of "constructive discharge."

A reasonable employee in Petitioner's position, a person who ostensibly spent *half of his career* filing EEO complaints and federal lawsuits to obtain promotions that would arguably advance his career in the Post Office that were denied to him, and to forestall and abate retaliation for complaining about the same, "may well be dissuaded" from participating in a discrimination investigation or proceeding if he knew

that in retaliation, he would be terminated for making even further complaints to management as threatened by Manager Lewis.

There can be no doubt that a reasonable employee in Petitioner's position could well find such a combination of threats and actions taken with the design of imposing both economic (falsification of time and denial of promotional opportunities) and psychological harm (threats of termination) sufficient to dissuade him from making or supporting a charge of discrimination. Johnson's claims of adverse retaliatory actions are not unlike the plaintiffs' claims in *Hicks*, (workplace sabotage and punitive scheduling), who, like Petitioner, had spent a significant part of their careers combating discrimination in the workplace.

Further, lesser conduct has sufficed under similar legal standards. *Velikonjo v. Gonzales*, 465 F.3d 122, 124 (D.C. Cir. 2006)(holding that the "prospect" of an investigation resulting from the employer's false accusations, during the pendency of which the employee was prevented from receiving promotions, and which prevented her from obtaining prized assignments, could dissuade a reasonable employee from making or supporting a charge of discrimination). Here, the unlawful choice Respondent put to Petitioner by its threats and actions is sufficient to seed it's claim under *Burlington Northern*. In this light, the Second Circuit erred in failing to consider Johnson's case in light of *Burlington Northern*, and erred in failing to appreciate that in retaliation cases in this post-*Burlington Northern* era, "context matters." 548 U.S. at 69.

III. THIS COURT SHOULD DIRECT THE DISTRICT COURT TO PERMIT PETITIONER TO PROCEED TO DISCOVERY

This Court has already remanded this case to the Second Circuit, only to have the vacated 2005 judgment erroneously reinstated by the District Court on remand from the Second Circuit two years prior. In these circumstances, rather than remand for a third time without specific guidance, this Court should exercise its power to direct the District Court to allow Petitioner to proceed to discovery. *See* 28 U.S.C. § 2106 ("The Supreme Court***may affirm, modify, vacate, set aside or reverse any judgment, decree or order of a court lawfully brought before it for review, and may remand the cause and direct entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.").

The Court has exercised that power in other instances where a lower court has failed to execute this Court's mandate. *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 621 (1966) ("[I]n view of the fact that this controversy already dates back more than eight years, that it has been before the Court of Appeals twice and that the relevant standard is not hard to apply in this instance, we think this controversy had better terminate now.").

CONCLUSION

The Court should grant certiorari and resolve the matter in light of *Burlington Northern*.

Respectfully submitted,

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APPENDIX

APPENDIX A — UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT SUMMARY ORDER

09-3484-cv
Johnson v. Potter

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan Courthouse, 500 Pearl Street, in the City of New York, on the 30th day of September, two thousand ten.

Present:

GUIDO CALABRESI,
ROBERT A. KATZMANN,
DENNY CHIN,
Circuit Judges.

Appendix A

ROLAND JOHNSON,

Plaintiff-Appellant,

v.

JOHN E. POTTER, Postmaster General and
UNITED STATES POSTAL SERVICE,

Defendants-Appellees.

No. 09-3484-cv

Appeal from an order of the district court (Siragusa, *J.)* granting summary judgment to defendants.

ON CONSIDERATION WHEREOF, it is hereby **ORDERED, ADJUDGED,** and **DECREED** that the order of the district court be and hereby is **AFFIRMED.**

Plaintiff-Appellant Roland Johnson appeals from a Decision and Order granting summary judgment to defendants, denying Johnson's motion for additional discovery pursuant to Federal Rule of Civil Procedure 56(f), and dismissing the complaint.

This is the second appeal arising from Johnson's third suit against the Postmaster General under Title VII of the Civil Rights Acts of 1964 ("Title VII"), as amended, 42 U.S.C. § 2000e *et seq.* Johnson's first suit alleging a denial of a promotion on the basis of his race was brought in 1990, but settled just two days into trial.

Johnson filed his second suit on January 15, 2002 *("Johnson II")* alleging retaliation in the wake of his first suit. The district court granted summary judgment to the defendant and we affirmed by summary order on December 15, 2005. While *Johnson II* remained pending, Johnson filed his third suit against defendant alleging retaliation and constructive discharge. The district court again granted summary judgment to defendants and we affirmed by summary order on June 7, 2006. Johnson subsequently moved for rehearing *en banc* in light of an intervening Supreme Court decision, *Burlington Northern & Santa Fe Railway Company v. White*, 548 U.S. 53 (2006). We denied the motion on November 29, 2006. Johnson then petitioned for and was granted certiorari by the Supreme Court. On June 25, 2007, the Supreme Court vacated the June 7, 2006 summary order and remanded the case "for further consideration in light of" *Burlington Northern.* Accordingly, this Court vacated the district court's judgment and remanded the case to the district court on August 10, 2007. Following supplemental briefing by the parties addressing the import of the *Burlington Northern* decision, the district court again granted summary judgment for defendants on June 21, 2009, partially on the basis of res judicata. This appeal followed. We assume the parties' familiarity with the additional relevant facts and procedural history of the case.

On appeal, Johnson primarily argues that the district court erred in having insufficiently considered Johnson's claims in light of *Burlington Northern.* We

review *de novo* a district court's grant of summary judgment. *Mathirampuzha v. Potter*, 548 F.3d 70, 74 (2d Cir. 2008). Grant of summary judgment on the basis of res judicata is also reviewed *de novo*. *Legnani v. Alitalia Linee Aeree Italiane, S.P.A.*, 400 F.3d 139, 141 (2d Cir. 2005) (per curiam). We review a denial of a Rule 56(f) motion for abuse of discretion. *Miller* v. *Wolpoff & Abramson, L.L.P.*, 321 F.3d 292, 300 (2d Cir. 2003).

We note at the outset that the holdings in *Burlington Northern* do not affect the application of res judicata itself. Res judicata bars relitigation of issues that were previously litigated by the same parties or their privies to a final judgment in a court of competent jurisdiction. *In re Teltronics Servs., Inc.*, 762 F.2d 185, 190 (2d Cir. 1985). Those criteria are all met here. The application of res judicata is appropriate even when the prior "judgment may have been wrong or rested on a legal principle subsequently changed," *Federated Dep't Stores v. Moitie*, 452 U.S. 394, 398 (1981). Therefore, we affirm the dismissal of all the claims previously adjudicated in *Johnson II* as barred by res judicata.

We have also examined Johnson's two new allegations of retaliation, individually and in context. In this respect, context means in the light of how a reasonable person would understand the new events, given the defendant's past actions, even though those prior actions are no longer actionable because of res judicata. *See Jute v. Hamilton*, 420 F.3d 166 (2d Cir. 2005) (holding the same with regard to the statute of limitations). We conclude that neither substantiates

retaliation under Title VII. Specifically, the record reveals that there was no discriminatory animus motivating the request for allegedly "excessive documentation" with respect to Johnson's claim under the Family Medical Leave Act ("FMLA") because the FMLA Coordinator was unaware of Johnson's discrimination complaints at the time of the document request. With respect to Laura Lewis's allegedly threatening statements to Johnson, we are satisfied that those statements do not constitute material adverse action under *Burlington Northern*. *See* 548 U.S. at 68; *Hicks v. Baines*, 593 F.3d 159, 165 (2d Cir. 2010).

Finally, because *Burlington Northern* does not affect this Court's previous decision to affirm the district court's dismissal of Johnson's constructive discharge claim and the denial of his Rule 56(f) motion, we decline to disturb those determinations. In any event, as to the Rule 56(f) motion, we find persuasive the district court's reasoning with respect to the merits of the claim, and, finding no abuse of discretion in denying Johnson's motion, also affirm on those grounds.

We have considered Johnson's additional arguments on appeal and find them to be without merit. We conclude that the district court appropriately considered the plaintiff's various allegations in light of *Burlington Northern*, individually and taken together. The district court having thus adequately discharged our directive under the remand, we hereby **AFFIRM** the order of the district court.

FOR THE COURT:
CATHERINE O'HAGAN WOLFE, CLERK

APPENDIX B — DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK DATED JULY 21, 2009

No. 04-CV-6634 CJS

ROLAND JOHNSON,

Plaintiff,

v.

JOHN E. POTTER, Postmaster General, United States Postal Service,

Defendant.

INTRODUCTION

This is an employment discrimination action alleging, in relevant part, retaliation and constructive discharge in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), as amended, 42 U.S.C. § 2000e *et seq.* The case is before the Court on remand from the Second Circuit Court of Appeals, "for further consideration in light of *Burlington N. & Santa Fe Ry. Co. v. White*, [548 U.S. 53,]126 S.Ct. 2405 (2006)," which was decided after this Court granted summary judgment for Defendant.[1] (Decision and Order, Docket

1. *Johnson v. Potter*, No. 05-5374-cv (2d Cir. Aug. 10, 2007).

No. [#21]). Accordingly, now before the Court is Defendant's motion (Docket [#3]) to dismiss the amended complaint for failure to state a claim pursuant to Federal Rule of Civil Procedure ("FRCP" 12(b)(6), and alternatively for summary judgment under FRCP 56, and Plaintiff's cross-motion (Docket No. [#9]) for leave to conduct discovery pursuant to FRCP 56(f). Also before the Court is Plaintiff's motion for reconsideration (Docket No. [#32]), filed after the case was remanded by the Second Circuit. For the reasons that follow, Plaintiff's applications are denied, Defendant's application for summary judgment is granted, and this action is dismissed.

BACKGROUND

This is the third employment discrimination lawsuit which Plaintiff has filed against the United States Postal Service. *See, Johnson v. Henderson,* 90-CV-7138 CJS and *Johnson v. Potter,* 04-CV-6239 CJS. Because they are relevant to the instant case, the Court will set forth the facts of the two previous lawsuits. Plaintiff is an African American male who was hired by the United States Postal Service in Buffalo, New York in 1985. In September 1989, Plaintiff filed a complaint with the Postal Service's Equal Employment Opportunities Office ("EEO"), alleging that he had been denied a promotion to the position of "204B Supervisor" because of his race. At that time Plaintiff's supervisor was Bill Mitchell ("Mitchell"). According to Plaintiff, Mitchell promised Plaintiff that he would be given another opportunity for promotion to 204B Supervisor, but later

reneged on the promise. Plaintiff subsequently commenced a lawsuit in this Court pursuant to Title VII entitled *Roland C. Johnson, Jr. v. William J. Henderson, Postmaster General, United States Postal Service*, Case No. 90-CV-7138 CJS(F) ("case 90-CV-7138").

Plaintiff continued working at the Postal Service while his lawsuit proceeded. In or about September 1998, Plaintiff was promoted to the position of Claims and Inquiry Clerk, PS-5. At all relevant times thereafter, at the branch where Plaintiff worked, there were two other Claims and Inquiry Clerks, Judith Grove ("Grove") and Diana Chandler ("Chandler"). Grove and Chandler held the same job classification as Plaintiff, PS-5, but had more seniority than Plaintiff. Plaintiff's position was also referred to as "Lost and Found" and "Loose-In-The-Mails" clerk. In that capacity, Plaintiff was responsible for handling items inadvertently mailed, dropped into mailboxes, or lost at the post office, such as bank envelopes containing cash and checks, and other personal property. Plaintiff stored these items in a locked cabinet in his work area. Plaintiff was the only one of the three Claims & Inquiry Clerks who routinely handled lost and found money. Plaintiff also worked with Kathy Deneka ("Deneka"), whose title was Complaints and Inquiry Clerk, PS-6. Plaintiff's supervisor was Maryann Molenda ("Molenda").

Plaintiff's lawsuit in case 90-CV-7138 was tried before the undersigned in November 1998. On the third day of the trial, the parties agreed to a complete

settlement. In exchange for settling the lawsuit, defendant agreed to pay Plaintiff $90,000.00 and restore 496 hours of sick leave. Plaintiff contends that after the lawsuit was settled, his immediate supervisor, Molenda, began to harass him and retaliate against him.

The alleged post-lawsuit harassment began with a disagreement between Plaintiff and Molenda over the procedures Plaintiff was to use for inventorying and storing certain items of mail. According to Plaintiff,

> supervisor Molenda directed me to keep a special 'log' of every single time I went into my overhead cabinet where money and registered mail was kept, in addition to the normal log that identified 'Matters Without Address Found in the Mails' that I was required to keep. No other postal employee under Molenda's supervision was subject to this treatment; indeed, my predecessor Lester Morris was only required to maintain the 'Matters Without Address Found in Mails' log.

Johnson Aff., 04-CV-6239 [#45] ¶¶ 37-38. While Plaintiff claims that "no other postal employee [was subjected] to such treatment," as indicated above, Plaintiff was the only employee who routinely handled lost and found money. Plaintiff's specific objection was that his predecessor had not been required to keep such a log. Molenda described the event differently, stating that Plaintiff

> was off from work for approximately 3 days during the early portion of November 1998. When he returned he stated his top drawer was opened and that he remembers locking it when he left. He mentioned that there are only two sets of keys; one he has and one I have. He requested I sign off that he is not responsible for missing items. I denied his request and he filed a grievance where an agreement was reached.

Id., Ex. W. The agreement referred to by Molenda, reached between the Postal Service and Plaintiff's union, in settlement of Plaintiff's grievance, provided, in relevant part:

> Management agrees to implement the following actions:
>
> 1) Clerk will deposit all monies on a daily basis.
>
> 2) Management will establish a inventory log, for all loose in the mail items kept under lock and key. Clerk will annotate on the inventory log final disposition of all items.
>
> 3) Manager, Consumer Affairs will arrange to have locks changed on drawers and cabinets.
>
> 4) Grievant's supervisor will maintain duplicate key. Whenever duplicate key is

> issued, the Mgr CA will record the individual name, time/date, and return time/date.

Id., Ex. E. Thus, while Plaintiff claimed that Molenda was retaliating against him by requiring him to keep an inventory log, the parties' subsequent agreement expressly provided for the creation of such a log.

In May 1999, Karl Anderson ("Anderson"), one of Plaintiff's supervisors, commented that Plaintiff's work area was "the dark side of the room." Plaintiff viewed the comment as a racial slur, although Anderson maintained that he was making a joke based upon the movie "Star Wars." In papers submitted in connection with a summary judgment motion, Plaintiff suggested that Anderson's comment was racially motivated because Plaintiff and another black employee were the only African-Americans on the side of the room to which Anderson referred. However, in a deposition, Plaintiff testified that there were African Americans stationed on both sides of the room when Anderson made his remark.

On or about May 27, 1999, Plaintiff and his union representative met with the Postal Service's District Manager, Nicholas Fabozzi ("Fabozzi"), to discuss the alleged harassment by Molenda and the "dark side" comment by Anderson.

On or about December 2, 1999, Molenda left a post-it note on Plaintiff's telephone, directing him to forward

calls when he was away from his desk. Plaintiff contends that he was singled out in this regard, and that Molenda did not tell other employees to forward their calls until after he complained of disparate treatment. Molenda, however, maintains that she left similar notes on all of her employees' phones at different times.

In January 2000, Plaintiff claimed to have overheard Grove and Deneka having a conversation in which they made comments which, although not about him, he found racially-offensive. Plaintiff states that "they were speaking about 'blacks not wanting to work and standing on the corner selling drugs and stuff.'" Plaintiff reported the incident to Molenda, who responded by issuing a memo that stated:

> It has come to my attention that employee(s) are using profane or obscene language in the office. This type of behavior will not be tolerated by management. This language is offensive to others. We must keep in mind that this office is a customer service officer, where at no given time [sic], customers are in our office or on the telephone who may also hear this type of language. This also relates to conversations amongst one another (when others can hear you) that may be offensive to others. Our workplace is a professional place of business and we must conduct ourselves in this manner. Thank you for your cooperation.

Pl. Supp. Appendix, 04-CV-6239 [#80], Ex. L. Although the memo was addressed to all of the employees in the office, and was sent in response to Plaintiff's complaint, Plaintiff maintained that the memo was intended to reprimand him for having complained.

On or about February 16, 2000, Molenda told Plaintiff to "drop everything" and handle claims while she and Deneka "had a personal conversation over coffee in her office." On or about March 6, 2000, Plaintiff and his union representative again met with Fabozzi to complain about what Plaintiff viewed as a continuing pattern of harassment by Molenda, as well as Molenda's preferential treatment of Deneka. Plaintiff asked that Molenda be required to attend "sensitivity training," but Fabozzi dismissed the idea.

On or about August 18, 2000, Molenda called a unit meeting and announced that she was taking duties that had been performed by the Claims and Inquiry department in Rochester, and was adding them to the Buffalo Claims & Inquiry department's duties. Additionally, Molenda directed the Rochester PS-5 Claims & Inquiry clerks to answer telephone inquiries received on a newly-installed "1-800" assistance line. Plaintiff initially alleged that Molenda used the occasion to retaliate against him by assigning additional duties only to him. However, he later admitted that the other PS-5 Claims and Inquiry Clerks were also given

additional duties similar to the ones he was given.[2] Nonetheless, Plaintiff continued to claim that Deneka was treated preferentially because she did not receive any additional PS-5 work, even though she was a PS-6 clerk.

Plaintiff also claimed he told Molenda that he was overwhelmed with work and needed help, but she refused to assist him. According to Plaintiff, Molenda told him that, if anything, she would consider creating an additional position for someone to assist Deneka in her work.

On August 25,2000, Plaintiff filed another EEO charge. In the EEO complaint, Plaintiff described an incident on August 18, 2000, as follows:

> I was 'combatively' approached by Consumer Affairs Manager Maryann Molenda. She

2. Molenda, in an affidavit submitted in connection with a subsequent EEO investigation, described the situation as follows: "I also had 2 Claims & Inquiry clerk positions in Rochester. Due to technology, the workload diminished and those 2 positions were abolished. An 800 line was put in for Rochester customers to call and that line is on all 3 level 5 Claims & Inquiry clerks phones in Buffalo, not just [Plaintiff's]. A light blinks when there is a call and the first to pick it up takes the call. If no one answers, it rolls over to Claims & Inquiry Clerk Bill Maturski's voice mail. The line is not on the level 6's phone (Kathy Deneka's) since the intent of the line was to assist customers in Rochester with Claims & Inquiry (level 5 positions)." Pl. Appendix to Local Rule 56.1 Counterstatement 04-CV-6239 [#71], Ex. T.

> remarked, 'I need to review the way you are doing things, especially the way you handle the money.' This overt racist statement has numerous + frequent [sic] since Sept. 1998.

P. Appendix to Local Rule 56.1 Counterstatement of Facts, 04-CV-6239 [#71], Exhibits I & U. However, Plaintiff subsequently gave a different version of those events:

> Immediately *after* Plaintiff filed his August 25, EEO charge, Molenda aggressively approached Plaintiff in front of others and remarked 'I want to review the way you are doing things, *the way you are doing them is probably wrong.*' (Exhibit A, p. 107, Lines 20-23).

Johnson Aff., 04-CV-6239 [#66] ¶¶ 70.

Plaintiff alleged that Molenda subsequently had him bring trays of mail to her for inspection, and kept lists of his tasks, but did not do so for other employees. Plaintiff also claimed that Molenda continued to scrutinize his handling of money. Plaintiff further maintained that Molenda made a list of his activities, and gave it to the union as proof that Plaintiff "did not have enough work to do." On August 30, 2000, Molenda directed that certain work which Plaintiff had been performing be performed by another unit known as the "Nixie Unit." On October 11, 2000, Molenda directed the Nixie Unit not to send trays of mail to Plaintiff, purportedly to avoid double handling. Molenda also told

Plaintiff to discontinue his usual practice of retrieving mail from the Nixie Unit for processing, because she would get it herself. According to Molenda,

> everyone's work was monitored, tallied, counted and recorded, not just [Plaintiff's]. This was done primarily because of the changes that occurred in Claims & Inquiry workload being done electronically in addition to other changes that HQ made nationally that affected Claims & Inquiry workload. With the ["]loose in the mails["] which [Plaintiff] works on, I wanted to see what Nixie [Unit] rewrap was giving him. [Nixie Unit has] been know to use us as a dumping ground. I have done this practice with the previous claims and inquiry clerk who now is retired. As a manager, the above monitoring should occur to know the workload and to correct any deficiencies found.

Pl. Appendix to Local Rule 56.1 Counterstatement 04-CV-6239 [#71] Ex. T. Plaintiff, however, claimed that Molenda was scrutinizing his work in order to harass him, and in order to decrease his workload so that she could justify eliminating his position.

In February 2001, Molenda sent a letter to the president of Plaintiff's labor union and to the Postal Service's labor relations specialist, notifying them that

she intended to eliminate Plaintiff's PS-5 position and create a new PS-6 position. Molenda's letter stated:

> This letter is to officially notify you, as outlined in Article 37 of the National Agreement, that position 2336157, Claims & Inquiry Clerk, currently held by Roland Johnson, is under consideration to be rescinded and to post a Complaints & Inquiry Clerk position, level 6. The workload for Claims & Inquiry Clerks [PS-5] will continue to decrease and the workload impacted by the following events:
>
> > In Fall of 2000, signature capture (electronic filing) took place. This sharply reduced the workload for Claims & Inquiry eliminating the manual filing and the manual lookups for accountable mail.
> >
> > Because of the electronic filing of accountable mail, filing claims is conducted in a shorter time frame.
> >
> > Effective September 1999, the Postal Inspection Service changed the procedures in handling PS Form 1510 (mail loss/rifling report) which sharply reduced the workload for Claims & Inquiry.

Appendix B

A decrease in claims being processed took effect in 1997 because of local adjudication with unnumbered claims. Streamlining efforts on overall claims process is under review by Headquarters.

The National Call Centers that are in place and their continued national roll out will impact the number of calls.

Headquarters is currently identifying process improvements for handling loose in the mail items at the point of discovery. A finished product should be seen sometime in Spring.

The workload for Complaints & Inquiry [PS-6] has steadily increased. Customers have additional means in contacting us with their service issues th[a]n just by telephone or in writing. Service issues are also received electronically through the National Call Centers and the Internet. A review of the workload by the Claims & Inquiry Clerks and Complaints & Inquiry Clerk has been conducted and warrants this decision. I am asking for your input by February 21, 2001.

Molenda Aff., 04-CV-6239 [#79] Ex. A. There is no indication in the record that the union responded to

Molenda's letter. On or about February 14, 2001, Molenda told Plaintiff that she was going to eliminate his position, and create a new Complaints and Inquiry Clerk position as a PS-6 position, for the purpose of assisting Deneka. On March 7, 2001, Molenda notified the union that she was going to "revert" Plaintiff's position and post a new PS-6 position. Plaintiff complained that Molenda was singling him out for retaliation. In response to that charge, Molenda told the EEO that

> [Plaintiff] is taking this personally. It is not HIS position I want to eliminate. I observed that there was not enough work for 3 level 5 Claims & Inquiry clerks, however, there was enough workload for another Complaints & Inquiry Clerk position. This occurred because of workload and volume that I conducted [sic] for several months when changes began in Claims & Inquiry workload due to HQ changes made nationally. While it is true, that because [Plaintiff] is the junior employee, it will be the position he occupies, but the reason for that is contractual, not personal, based on unit seniority.

Pl. Appendix to Local Rule 56.1 Counterstatement, 04-CV-6239 [#71] Ex. T. Plaintiff claimed that Molenda's proposal violated the collective bargaining agreement between the union and the postal service. However, the union did not support him in that regard. Plaintiff subsequently filed complaints with both the union and

the Merit System Protection Board. On April 30, 2001, the postal service advised Plaintiff that it was "rescinding" its attempt to eliminate the position at that time, but would review the matter in six months.

On May 21, 2001 Plaintiff filed another EEO complaint. This time he alleged retaliation by Molenda.

On July 23, 2001, Plaintiff claimed that someone sabotaged his telephone by placing a sticky glue-like substance on it. Plaintiff had no idea what was on the phone or how it came to be there. In response, the postal service replaced the phone. At around this same time, all the members of Plaintiff's work unit were assigned new telephone extension numbers. Plaintiff alleged that his co-workers received their new numbers before him, although he could not say how long he had to wait for his number. He also claimed that after he was assigned a new telephone number, he received fewer phone calls.

On August 15, 2001, Molenda went on leave and appointed Deneka to handle certain tasks while she was away, such as the collection of leave slips. On August 17, 2001, Plaintiff gave a leave slip to Deneka. Plaintiff's request was apparently not transmitted to the appropriate person, and as a result, he lost 2 hours of pay. However, he was reimbursed for the error.

On October 19, 2001, the EEO issue a final order dismissing all of Plaintiff's claims of harassment and retaliation.

Appendix B

In November 2001, the lock on Plaintiff's desk drawer became stripped. Plaintiff complained that this was an act of vandalism, although he had no idea nor any proof as to how the damage occurred. Plaintiff stated that he never checked to see if anything had been taken from the drawer. On or about December 10, 2001, someone placed a note saying "keep out" on Plaintiff's work cubicle.

In January 2002, Plaintiff commenced his second lawsuit, *Johnson v. Potter*, 02-CV-6025, which was later re-numbered as case number 04-CV-6239 ("case 04-CV-6239"). In that case, Plaintiff alleged that the foregoing instances of alleged mistreatment constituted retaliation under Title VII.

On or about November 29, 2002, the office Marketing Manager, Laura Lewis ("Lewis"), promoted Deneka to the position of Customer Service Representative, EAS-13. Plaintiff claimed that Deneka's promotion was retaliatory, since he was never notified of the opening. However, Plaintiff subsequently admitted that he had been out of work on sick leave when Deneka was promoted, and that he did not know whether or not the position had been posted. On the other hand, Defendant submitted proof that the position had been posted and that as a result of the posting, six individuals applied for the position.

At some point between March 2002 and February 14, 2003, Plaintiff made a claim under the Family Medical Leave Act ("FMLA"). According to Plaintiff, an

administrative employee required him to submit "excessive documentation" in support of his FMLA claim. Nonetheless, Plaintiff's FMLA leave request was apparently granted.

On February 18, 2003, Plaintiff's pay check was short by $115. After notifying his supervisors of the error, Plaintiff was reimbursed the $115 a few days later. Although Plaintiff claimed the shorting of his pay was intentional, he admitted that he had no proof to support his theory.

On April 8, 2003, Plaintiff filed an Amended Complaint [#20], which served as the operative complaint throughout the remainder of case number 04-CV-6239. The complaint alleged "an ongoing pattern of retaliation."[3]

On April 21, 2003, Plaintiff filed an EEO complaint regarding the FMLA "excessive documentation" incident, the one-day pay shortage, and Deneka's promotion.

On or about April 24, 2003, Plaintiff wrote a letter to Lewis accusing her of sexually harassing him. Lewis asked Plaintiff to discuss the letter, but Plaintiff refused. Sometime after that, Lewis confronted Plaintiff and said, "why don't you be a man and talk about the letter." Lewis further stated that Plaintiff's problem was that he was "seeing dollar signs," and that "it wasn't going

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3. *Id.* at ¶ 168.

to happen off her career." Lewis further said that "she was aware that Plaintiff was afraid of losing his job, but that if anyone were to be fired, he would be the first to go." Although Plaintiff characterized this last statement as a retaliatory threat, he admitted that he was the least senior of the Complaint and Inquiry Clerks, and that if "any of the three Claims and Inquiry positions need[ed] to be abolished ... [he] would be the next person in line to be terminated because of [his] lack of seniority."[4]

Plaintiff left work on sick leave in May 2003, and never returned. Plaintiff resigned his position on August 15, 2003. On September 5, 2003, Plaintiff filed a request for EEO "pre-complaint counseling," alleging that he had been constructively discharged. Plaintiff stated that his alleged constructive discharge "comes after persistent management harassment and a 8/13/03 + 8/14/03 revelation that an 'involuntary deduction' of $6,808.00 by the agency to pay my creditors during a 1998 civil trial, has not been paid."

In May 2004, some nine months after Plaintiff claims that he was constructively discharged, Plaintiff moved before this Court for leave to file a second amended complaint in case 04-CV-6239. The proposed second amended complaint contained a claim for constructive discharge, and also included allegations of retaliation by Lewis concerning her comments to him in April 2003. The Court denied the application to amend, finding that Plaintiff had failed to demonstrate good cause for his

4. *See*, 04-CV-6634, Amended Complaint [#2], ¶¶ 164-65.

delay in failing to move to amend the complaint beyond the deadline set by the Court.

After having a full opportunity to conduct discovery, the parties each subsequently moved for summary judgment in case 04-CV-6239. By Decision and Order [#83] filed on March 2, 2005, the Court denied Plaintiff's application for summary judgment, granted Defendant's application, and dismissed the action. In connection with those cross motions, it was undisputed that Plaintiff had engaged in protected activity. However, Defendant asserted that none of the alleged acts of retaliation amounted to an "adverse employment action" under Title VII. Plaintiff, relying on the Second Circuit's decision in *Richardson v. New York State Dep't of Correctional Servs.*, 180 F.3d 426, 436 (2d Cir. 1999), argued that the adverse employment action consisted of "unchecked retaliatory co-worker harassment." Plaintiff alternatively asserted that the alleged retaliatory acts by Molenda constituted adverse employment actions. The Court rejected the "unchecked retaliatory co-worker harassment" theory, finding that Plaintiff had failed to come forward with evidence that the alleged harassment by co-workers was either retaliatory or unchecked. The Court also found that Defendant was entitled to judgment regarding the alleged retaliation by Molenda, in some instances because Plaintiff had failed to demonstrate a prima facie case, and in other instances because Plaintiff failed to come forward with evidentiary proof, establishing that the Defendant's proffered reasons were false or pretextual. The Court's summary judgment decision in

case number 04-CV-6239 addressed all of the alleged acts of retaliation discussed above, except for the two which Plaintiff did not assert in that case: 1) the claim that Plaintiff was required to submit excessive documentation in support of his FMLA claim; and 2) the claim that Lewis retaliated against Plaintiff in April 2003 by threatening his job. Plaintiff appealed, and on December 15, 2005, the Second Circuit affirmed this Court's judgment. (USCA Case number 05-1231-cv).

On December 29, 2004, while the summary judgment motions were pending in case number 04-CV-6239, Plaintiff filed the subject action. The complaint set forth the allegations of retaliation involving the FMLA claim and the alleged threats by Lewis, along with all of the allegations of retaliation that were raised in case number 04-CV-6239. Based upon these allegations, Plaintiff asserted two causes of action: retaliation and constructive discharge. Amended Complaint [#2] ¶¶ 179-87. With regard to the retaliation claim, the complaint stated, in relevant part:

> Plaintiff engaged in protected activity when he made both informal and formal EEO complaints on March 19, 2003, April 21, 2003, May 15, 2003, [and] June 12, 2003. Shortly thereafter, he was subject to adverse employment action, including threats to terminate his position, falsifying his time card,[5]

5. The alleged falsification of Plaintiff's time card actually occurred in February 2003. See Amended Complaint [#21] ¶¶ 123,167,169.

> and ultimately, his constructive discharge in retaliation for having engaged in said protected activity.

Amended Complaint [#2], ¶ 180. Based upon the dates contained in the paragraph above, the retaliation claim was based solely upon alleged adverse employment actions occurring on and after March 19, 2003. The constructive discharge claim, on the other hand, was based upon all of the instances of alleged retaliation discussed above, including those occurring prior to March 19, 2003. In other words, with the exception of the FMLA incident and the alleged harassment by Lewis, the constructive discharge claim was based on the retaliation claims which the Court had dismissed in case number 04-CV-6239.

Prior to conducting any discovery in this action, Defendant filed the subject motion seeking dismissal and/or summary judgment. Defendant contended that the retaliation claim should be dismissed for several reasons. First, Defendant argued that the acts of alleged retaliation were barred by collateral estoppel, except for the FMLA incident and the alleged threats by Lewis. And, as to those two incidents, Defendant maintained that Plaintiff could not establish a prima facie case of retaliation, since Plaintiff suffered no adverse employment action. Defendant further noted that the FMLA incident was not retaliatory for two additional reasons: First, the FMLA incident pre-dated the protected activity alleged by Plaintiff; and second, there was no evidence that the employee who supposedly

requested "excessive FMLA documentation" from Plaintiff was aware of Plaintiff's protected activity. Defendant also argued that the constructive discharge claim should be dismissed for several reasons. First, Defendant contended that, since the incidents which Plaintiff relied on in support of his constructive discharge claim were the same incidents of alleged retaliation that the Court already dismissed, the constructive discharge claim was barred by collateral estoppel. More specifically, Defendant maintained that since the incidents of alleged retaliation did not amount to "adverse employment actions," they necessarily fell short of establishing the aggravated circumstances required to establish a constructive discharge. Alternatively, Defendant contended that the acts of alleged retaliation upon which the constructive discharge claim was based failed, as a matter of law, to establish a constructive discharge. Lastly, Defendant argued that the constructive discharge claim had not been timely filed with the EEOC, and also had not been administratively exhausted.

In response to Defendant's motion, Plaintiff filed an application under Rule 56(f). Plaintiff stated that he needed to conduct discovery before responding to Defendant's motion, primarily so that he could establish that his constructive discharge claim was both timely filed with the EEOC and administratively exhausted. Plaintiff also requested leave to obtain discovery from his own doctors, so that he could establish that it was medically necessary for him to resign his position.

Defendant subsequently filed a reply, conceding, for purposes of the subject motions, that Plaintiff's constructive discharge claim was both timely filed and administratively exhausted. Defendant maintained, however, that Plaintiff was not entitled to discovery, and that the case should be dismissed.

On August 18, 2005, counsel for the parties appeared before the undersigned for oral argument of the subject motions. Notably, during oral argument, Plaintiff's counsel contended that acts which fail rise to the level of "adverse employment actions" under Title VII may nonetheless establish a constructive discharge.

On September 16, 2005, the Court issued a Decision and Order [#21], granting Defendant's application for summary judgment, denying Plaintiff's cross-motion for leave to conduct discovery pursuant to Fed. R. Civ. P. 56(f), and dismissing the action. The Court granted summary judgment on Plaintiff's retaliation claims, for several reasons. As mentioned above, Plaintiff had alleged that he was retaliated against in numerous ways, including that: 1) he was required to submit "excessive documentation" in support of an FMLA claim that was granted; and 2) Supervisor Laura Lewis ("Lewis") confronted Plaintiff, after he accused her of sexually harassing him, and told him, *inter alia*, that he was "seeing dollar signs," that "it wasn't going to happen off her career," and that "she was aware that Plaintiff was afraid of losing his job, but that if anyone were to be fired, he would be the first to go." (Decision and Order [#21] at 12-13). As for the comment about being the

"first to go," it is undisputed that Plaintiff was the least senior PS-5 "Complaint and Inquiry Clerk," and that a PS-5 clerk position was being considered for elimination ostensibly because of changes in technology and workload. The Court found that all of the alleged instances of retaliation, except for Lewis's alleged threats, were barred by claim preclusion/*res judicata*. *Id.* at 25.[6] Alternatively, the Court found that neither the FMLA "excessive documentation" incident, nor Lewis's alleged threats, amounted to "adverse employment actions." *Id.* at 25-26. Significantly, in setting forth the principles of law applicable to claims for retaliation, the Court recited the then-settled law that, "[t]o make a prima facie showing of an adverse employment action, the Plaintiff must show that the employer's actions caused a materially adverse change in the terms and conditions of employment." *Id.* at 20 (*citing Valentine v. Standard & Poors*, 50 F.Supp.2d 262, 283 (S.D.N.Y. 1999), *aff'd*, 205 F.3d 1327 (2000)).

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6. The Court wrote: "The Court previously granted summary judgment to defendant on all of the very same claims of retaliation alleged here except for two, the FMLA incident and the alleged threats by Lewis. Moreover, as to the FMLA claim, Plaintiff had an opportunity to include that claim in the previous action, but chose not to do so. Specifically, Plaintiff was obviously aware of the FMLA incident at the time he amended his complaint in case number 02-CV-6239 on April 8, 2003. Consequently, that claim, as well as all of the claims of retaliation that the Court specifically addressed in the prior action are barred by res judicata." (Decision and Order [#21] at 25) (Citation omitted).

Additionally, the Court found that Defendant would be entitled to summary judgment on the FMLA excessive documentation claim *in any event*, since it was undisputed that the person who asked for the "excessive documentation" was unaware that Plaintiff had engaged in protected activity. *Id.* at 25. Similarly, the Court ruled that even if Lewis's "threat" that Plaintiff would be "the first to go" amounted an adverse employment action, Defendant was nevertheless entitled to summary judgment, since the potential elimination of Plaintiff's position, which ultimately never occurred, was "warranted for legitimate business reasons." *Id.* at 26.

Plaintiff appealed, and on June 7, 2006, the United States Court of Appeals for the Second Circuit issued a Summary Order affirming this Court's decision. Plaintiff then applied for a writ of certiorari to the United States Supreme Court. On June 22, 2006, the Supreme Court issued its decision in *Burlington N. & S.FR. Co. v. White*, 548 U.S. 53, 126 S.Ct. 2405 (2006). The *Burlington Northern* decision addressed two issues concerning Title VII's anti-retaliation provision: "Does that provision confine actionable retaliation to activity that affects the terms and conditions of employment? And how harmful must the adverse actions be to fall within its scope?" *Id.*, 126 S.Ct. at 2408. The Supreme Court answered the first question in the negative, and held that "[t]he scope of the anti-retaliation provision extends beyond workplace-related or employment-related retaliatory acts and harm." *Id.* at 2414. As for the second issue, the Supreme Court held that "a plaintiff must show that a reasonable employee would have found the challenged

action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Id.* at 2415 (citations and internal quotations omitted).

On June 25,2007, the Supreme Court granted Plaintiff's petition for writ of certiorari, vacated the judgment, and remanded the case to the Second Circuit "for further consideration in light of" the *Burlington Northern* decision. *Johnson v. Potter*, 127 S.Ct. 3003 (Mem) (Jun. 25, 2007). On August 10, 2007, the Second Circuit vacated this Court's judgment and remanded the case "for further proceedings consistent with the order of the United States Supreme Court." *Johnson v. Potter*, No. 05-5374-cv (2d Cir. Aug. 10, 2007).

Subsequently, this Court issued an Order [#28], granting the parties permission to file supplemental memorandums of law, "addressing the effect of the *Burlington Northern* decision on defendant's summary judgment motion." Defendant filed a memo of law, arguing that summary judgment was still appropriate in light of the *Burlington Northern* decision. (Memo of Law and Supplemental Appendix, Docket Nos. [##30, 31]). Specifically, Defendant maintained that under the standard set forth in *Burlington Northern*, the incidents identified by Plaintiff still failed to amount to actionable retaliation. Defendant further observed that, even if the complained-of incidents were sufficiently adverse, summary judgment was still appropriate, for the reasons explained in the Court's prior decision, which were not affected by the *Burlington Northern* decision. Finally,

Defendant contended that the *Burlington Northern* decision did not alter the Court's prior rulings concerning res judicata, constructive discharge, or Plaintiff's Rule 56(f) application.

Plaintiff, however, disagreed, and argued that the *Burlington Northern* decision required the Court to reconsider its rulings as to the retaliation and constructive discharge claims, as well as its ruling on *res judicata*.[7] In that regard, Plaintiff filed a "Motion for Reconsideration" [#32], which maintains that: 1) *Burlington Northern* changed the relevant legal standard, therefore res judicata does not apply; and 2) under the *Burlington* standard, Plaintiff has pleaded claims for retaliation and constructive discharge.

Having further considered the various motions in light of *Burlington Northern*, the Court again finds that Defendant is entitled to summary judgment.

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7. As mentioned above, in its decision granting summary judgment to Defendant, the Court held that with the exception of the alleged threat by Lewis, all of the Plaintiff's retaliation claims were barred by *res judicata*, or claim preclusion, since they either were raised or could have been raised in Plaintiff's earlier actions. Plaintiff mistakenly characterizes that ruling as involving the separate doctrine of collateral estoppel, or issue preclusion. (Plaintiff's Memo of Law [#32] at 11).

Appendix B

STANDARDS OF LAW

Rule 56

The standard for granting summary judgment is well established. Summary judgment may not be granted unless "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). A party seeking summary judgment bears the burden of establishing that no genuine issue of material fact exists. *See, Adickes v.* S.H. *Kress & Co.*, 398 U.S. 144, 157 (1970). "[T]he movant must make a prima facie showing that the standard for obtaining summary judgment has been satisfied." 11 MOORE'S FEDERAL PRACTICE, § 56.11 [1][a] (Matthew Bender 3d ed.). "In moving for summary judgment against a party who will bear the ultimate burden of proof at trial, the movant may satisfy this burden by pointing to an absence of evidence to support an essential element of the nonmoving party's claim." *Gummo v. Village of Depew*, 75 F.3d 98, 107 (2d Cir. 1996)*(citing Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986)), *cert denied*, 517 U.S. 1190 (1996). Once that burden has been established, the burden then shifts to the non-moving party to demonstrate "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); *Anderson v. liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). To carry this burden, the non-moving party must present evidence sufficient to support a jury verdict in

its favor. *Anderson*, 477 U.S. at 249. The parties may only carry their respective burdens by producing evidentiary proof in admissible form. Fed. R. Civ. P. 56(e). The underlying facts contained in affidavits, attached exhibits, and depositions, must be viewed in the light most favorable to the non-moving party. *U.S. v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). Summary judgment is appropriate only where, "after drawing all reasonable inferences in favor of the party against whom summary judgment is sought, no reasonable trier of fact could find in favor of the non-moving party." *Leon v. Murphy*, 988 F.2d 303, 308 (2d Cir.1993).

When a party is unable to produce affidavits in opposition to a summary judgment motion, she may make an application pursuant to Rule 56(f), which states:

> **When Affidavits are Unavailable.** Should it appear from the affidavits of a party opposing the motion [for summary judgment] that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Fed. R. Civ. P. 56(f). In this Circuit, the requirements for obtaining relief under Rule 56(f) are as follows:

> [A] party resisting summary judgment on the ground that it needs discovery in order to

> defeat the motion must submit an affidavit showing '(1) what facts are sought [to resist the motion] and how they are to be obtained, (2) how those facts are reasonably expected to create a genuine issue of material fact, (3) what effort affiant has made to obtain them, and (4) why the affiant was unsuccessful in those efforts.

Miller v. Wolpoff & Abramson, L.L.P., 321 F.3d 292, 303 (2d Cir. 2003) (citations omitted).

A district court's decision to deny a request for additional discovery under Rule 56(f) is reviewed on appeal using the "abuse of discretion" standard. *Gualandi v. Adams*, 385 F.3d 236, 244 -245 (2d Cir. 2004). However, in this regard, it is clear that as a general rule, summary judgment is strongly disfavored where the non-moving party has had no opportunity to conduct discovery. *Trammell v. Keane*, 338 F.3d 155, 161 (2d Cir. 2003) ("[O]nly in the rarest of cases may summary judgment be granted against a plaintiff who has not been afforded the opportunity to conduct discovery.") *(quoting Hellstrom v. U.S. Dep't* of *Veterans Affairs*, 201 F.3d 94, 97 (2d Cir. 2000); *see also, Abercrombie & Fitch Stores, Inc. v. American Eagle Outfitters, Inc.*, 280 F.3d 619, 627 (6th Cir. 2002) ("If the non-movant makes a proper and timely showing of a need for discovery, the district court's entry of summary judgment without permitting him to conduct any discovery at all will constitute an abuse of discretion.").

Appendix B

Title VII

"Title VII makes it unlawful for an employer to discriminate against any individual with respect to the 'compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.'" *Richardson v. New York* State *Department* of *Correctional Services*, 180 F.3d 426, 436 (2d Cir. 1999)(citations omitted; abrogated on other grounds). However, "Title VII does not establish a 'general civility code' for the American workplace. Simple teasing, offhand comments, or isolated incidents of offensive conduct (unless extremely serious) will not support a claim of discriminatory harassment." *Petrosino v. Bell Atlantic*, 385 F.3d 210, 223 (2d Cir. 2004) (citation omitted).

Title VII Retaliation

To establish a prima facie case of retaliation under Title VII, "a plaintiff must demonstrate participation in protected activity known to the defendant, an employment action disadvantaging the person engaged in the protected activity, and a causal connection between the protected activity and the adverse employment action." *Cruz v. Coach Stores, Inc.*, 202 F.3d 560, 566 (2d Cir. 2000) (citations and internal quotations omitted); *see also, Nieves v. Angelo, Gordon & Co.*, No. 07-2330-cv, 2009 WL 1910970 at *2 (2d Cir. Jul. 6, 2009). Making a complaint regarding harassment to one's supervisor is "protected activity" under Title VII. *Cruz v. Coach Stores, Inc.*, 202 F.3d at 566. To be actionable,

"a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Burlington N. & Santa Fe Ry. Co. v. White*, 126 S.Ct. at 2415.

Title VII Constructive Discharge

The elements of a claim for constructive discharge are as follows:

> A constructive discharge occurs when the employer, rather than acting directly, deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation. In determining whether or not a constructive discharge has taken place, the trier of fact must be satisfied that the working conditions would have been so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign.

Pena v. Brattleboro Retreat, 702 F.2d 322, 325 (2d Cir. 1983) (Citations and internal quotation marks omitted). However,

> [a] constructive discharge generally cannot be established . . . simply through evidence that an employee was dissatisfied with the nature of his assignments. . . . Nor is it sufficient that

> the employee feels that the quality of his work has been unfairly criticized. . . . Nor is the standard for constructive discharge merely whether the employee's working conditions were difficult or unpleasant.

Stetson *v. NYNEX Service Co.*, 995 F.2d 355, 360 -361 (2d Cir. 1993) (citations and internal quotation marks omitted). Instead, the plaintiff "must show that the abusive working environment became so intolerable that her resignation qualified as a fitting response." *Pennsylvania State Police v. Suders*, 542 U.S. 129, 124 S.Ct. 2342, 2347 (2004).

Title VII discrimination and retaliation claims are analyzed under the three-tier burden-shifting test "set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), and its progeny." *Valentine v. Standard & Poors*, 50 F.Supp.2d at 281-82 (S.D.N.Y. 1999)(Citations and internal quotations omitted). Under the first tier of the *McDonnell Douglas* test, the plaintiff must establish a prima facie case. If the plaintiff establishes his prima facie case[8],

> the burden shifts to the employer to articulate some legitimate, nondiscriminatory reason for

8. It is clear that "the burden of proof that must be met to permit an employment-discrimination plaintiff to survive a summary judgment motion at the prima facie stage is *de minimis.*" *Chambers v. TRM Copy Centers Corp.*, 43 F.3d 29, 37 (2d Cir. 1994) (emphasis in original, citation and internal quotation marks omitted).

> the employee's discharge. At this stage, the employer need only articulate—but need not prove—the existence of a nondiscriminatory reason for its decision. If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted, and the factual inquiry proceeds to a new level of specificity. Once defendant meets its burden of production, the burden shifts back to plaintiff. Under the third tier of the *McDonnell Douglas* test, plaintiff bears the ultimate burden of proving that the reason proffered by the employer is a pretext for unlawful discrimination. In order to survive a motion for summary judgment, plaintiff must establish a genuine issue of material fact as to whether the employer's reason for discharging her is false and as to whether it is more likely that a discriminatory reason motivated the employer to make the adverse employment decision.

Valentine, 50 F.Supp.2d at 281-82 (Citations and internal quotations omitted).

Courts must be "particularly cautious about granting summary judgment to an employer in a discrimination case when the employer's intent is in question. Because direct evidence of an employer's discriminatory intent will rarely be found, affidavits and depositions must be carefully scrutinized for circumstantial proof which, if believed, would show

discrimination." *Schwapp v. Town of Avon*, 118 F.3d 106, 110 (2d Cir.1997)(citations and internal quotations omitted). However, a plaintiff may not defeat a motion for summary judgment merely by relying upon "purely conclusory allegations of discrimination, absent any concrete particulars." *Meiri v. Dacon*, 759 F.2d 989, 998 (2d Cir. 1985), *cert. den.* 474 U.S. 829.

ANALYSIS

Applying the foregoing principles of law to the facts of this case, the Court finds, at the outset, that Plaintiff's cross-motion under Rule 56(f) should be denied. The Court is mindful that, as discussed above, a Rule 56(f) application should ordinarily be granted where the plaintiff has conducted no discovery. *See, e.g., Czerw v. Ronald Billitier Elec., Inc.*, 03-CV-6613 (CJS) & 03-CV-6614 CJS, 2005 WL 1159425 at *8 (W.D.N.Y. May 17, 2005) (Siragusa, J.) ("[A] grant of summary judgment before any discovery has been conducted would be inappropriate, since plaintiff has not had a fair opportunity to show that defendants' articulated reasons are pretextual."). However, the instant case is unusual in that Plaintiff already had a full opportunity to conduct discovery in the prior proceeding between these parties involving essentially the same claims. *Sty-Lite Co. v. Eminent Sportswear Inc.*, No. 01 Civ. 3320 (CBM), 2002 WL 15650 at *5 (S.D.N.Y. Jan. 7, 2002) ("[A]lthough it is technically true that no discovery has taken place in the *present* incarnation of this case, [plaintiff] had ample opportunity to conduct full discovery in the identical ***prior*** **action**.") (emphasis in

original). In fact, the parties were conducting discovery in case number 04-CV-6239 as late as August 2003, and Plaintiff was deposed by defendant on August 14, 2003, the day before Plaintiff resigned his position. Accordingly, the Court does not view this case as one in which Plaintiff has had no opportunity to conduct discovery, but on the contrary, views it as a case where Plaintiff has already had a full opportunity to do so.

Nor does the Court believe that the additional discovery which Plaintiff seeks would be helpful. Most notably, the discovery that Plaintiff wants to obtain largely pertains to the timeliness of his constructive discharge claim, and to the administrative exhaustion of that claim. However, that discovery is unnecessary, since as discussed above, Defendant concedes, for purposes of this motion, that the claim is both timely and administratively exhausted. As for the "discovery" that Plaintiff wants to obtain from his own doctors, the Court sees no reason why Plaintiff could not have obtained such evidence already, since, in addition to being available to him directly through the doctors, the information that he references is also part of the administrative record in his social security disability case. In any event, that information, purportedly detailing Plaintiff's subjective reactions to the alleged harassment, would be irrelevant, since the standard to be applied in a constructive discharge case is an objective one.

For all of these reasons, Plaintiff's cross-motion under Rule 56(f) is denied. Plaintiff's alternative

request for additional time to respond to the summary judgment motion, in the event that the Court rejected his Rule 56(f) application, is also denied. *See, Players, Inc. v. City of New York*, 371 F.Supp.2d 522, 534 (S.D.N.Y. 2005) (discussing reasons why a plaintiff whose Rule 56(f) application fails is not necessarily entitled to an additional opportunity to oppose the summary judgment motion). Plaintiff made a tactical decision to proceed in the manner that he did in this case, and the Court declines to extend the briefing schedule. *See, Id.*

Next, turning to the merits of Defendant's summary judgment motion, the Court finds that Defendant is entitled to summary judgment on Plaintiff's retaliation claims. The Court previously granted summary judgment to Defendant on all of the very same claims of retaliation alleged here except for two, the FMLA incident and the alleged threats by Lewis. Moreover, as to the FMLA claim, Plaintiff had an opportunity to include that claim in the previous action, but chose not to do so. Specifically, Plaintiff was obviously aware of the FMLA incident at the time he amended his complaint in case number 02-CV-6239 on April 8, 2003. Consequently, that claim, as well as all of the claims of retaliation that the Court specifically addressed in the prior action are barred by res judicata. *Monahan v. New York City Dept. of Corrections*, 214 F.3d 275, 284 -285 (2d Cir. 2000) ("The doctrine of res judicata, or claim preclusion, holds that a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action.").

Such preclusion of those retaliation claims that were, or could have been, raised in the earlier actions is not affected by the Supreme Court's decision in *Burlington Northern*. *See, Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 394, 101 S.Ct. 2424, 2428 (1981) ("A final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. Nor are the res judicata consequences of a final, unappealed judgment on the merits altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case.") (citations omitted).[9]

Even assuming, however, that the FMLA claim was not barred by res judicata, Defendant would still be entitled to summary judgment. Plaintiff has not established a prima facie case of retaliation concerning

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9. Plaintiff cites *Montana v. United States*, 440 U.S. 147, 153-155, 99 S.Ct. 970, 973 (1979) for the proposition that collateral estoppel may not apply where "legal principles have changed significantly" since the prior judgment. (Plaintiff's Memo of Law [#32] at 11). In that regard, Plaintiff maintains that collateral estoppel should not apply, since the *Burlington Northern* decision significantly changed the legal principles involved in Title VII retaliation claims. However, the *Montana* case is inapplicable here, since it concerns collateral estoppel-issue preclusion, while the Court's decision concerns the separate doctrine of res judicata-claim preclusion. In any event, Plaintiff's argument, if correct, would only affect the FMLA excessive documentation claim, since Plaintiff maintains that he is not seeking to relitigate any claims actually raised in his earlier lawsuits. (Plaintiff's Memo of Law [#32] at 14).

the FMLA incident for at least two reasons: First, Plaintiff suffered no materially adverse retaliation, but rather, he claims only that he was required to submit what he viewed as "excessive documentation" in support of his FMLA claim; and second, Plaintiff has come forward with no evidence to refute the affidavit of the FMLA claim administrator, who states that he was unaware of Plaintiff's protected activity when he requested such documentation.

Similarly, Plaintiff has failed to demonstrate a prima facie case of retaliation concerning the alleged threats by Lewis. Specifically, even accepting that Lewis told Plaintiff to "be a man," that she told him he was "seeing dollar signs," and that she said that "if anyone was fired, he would be the first to go," these incidents were not materially adverse to Plaintiff, either separately or together. *See, e.g., Pugni v. Reader's Digest Ass'n, Inc.*, No. 05 Civ. 8026(CM), 2007 WL 1087183 at *23 (S.D.N.Y. Apr. 9, 2007) (Supervisor's threat that plaintiff's days at the company "were numbered" "did not constitute a materially adverse action. The alleged threat, assuming it happened, was never carried out."). On that point, although Plaintiff characterizes Lewis's comment about being "the first to go" as a threat, the statement was a factual observation concerning Plaintiff's status as the least-senior PS-5 clerk. Moreover, even assuming *arguendo* that Lewis's comment that Plaintiff "would be the first to go" met the low threshold for a prima facie showing, Defendant came forward with a legitimate non-discriminatory reason for the comment. Specifically, the Postal Service was considering eliminating the

position, and Plaintiff was the PS-5 clerk with the least seniority. Moreover, Defendant has presented evidence that the proposed elimination of Plaintiff's position, and the creation of a new PS-6 position, even though it never occurred, was warranted for legitimate business reasons. Namely, the PS-5 clerks had too little work to do, and the PS-6 clerk had too much. Plaintiff has not come forward with any evidentiary proof in admissible form to the contrary. Accordingly, Defendant is entitled to summary judgment on Plaintiff's retaliation claims.

The Court will now consider Plaintiff's constructive discharge claim. The Court finds that where, as here, a plaintiff is claiming that he was constructively discharged based upon acts of retaliation,[10] the acts complained of must actually constitute retaliation under Title VII. In *Suders*, the Supreme Court dealt with "one subset of Title VII constructive discharge claims: constructive discharge resulting from sexual harassment, or "hostile work environment." *Pennsylvania State Police v. Suders*, 124 S.Ct. at 2352. The Supreme Court further noted that, "[c]reation of a hostile work environment is a necessary predicate to a hostile-environment constructive discharge case." *Id.* at 2356. Presumably then, when dealing with a claim for constructive discharge resulting from retaliation, actual retaliation is a necessary predicate. See, *Downey v.*

10. *See*, Amended Complaint [#2] ¶¶ 4 (Plaintiff alleged that he was "subject to an ongoing pattern of retaliation between March 2002 through February 14, 2003 which then culminated in his constructive discharge on August 14, 2003."). Plaintiff has never asserted in his lawsuits before this Court that he was subjected to a hostile work environment.

Isaac, 622 F.Supp.1125, 1133 (D.D.C. 1985) ("In sum, in a retaliatory constructive discharge case, *a plaintiff must show that he/she was retaliated against* because of his/her E.E.O. activity and that retaliation constituted intolerable working conditions in which a reasonable person in similar circumstances would have felt compelled to resign.") (emphasis added), *aff'd without opinion* 794 F.2d 753 (D.C. Cir. 1986); *Delashmutt v. Wis-Pak Plastics, Inc.*, 990 F.Supp. 689, 697 (N.D. Iowa 1998) (Stating, regarding "constructive discharge as the result of retaliatory conduct," that "if [a plaintiff] cannot prove retaliation, because she cannot prove any adverse employment action, then she *necessarily* cannot prove her employer made her working environment so intolerable as to establish any independent constructive discharge claim.") (emphasis added); *Amato v. Package Machinery Co.*, Civ. A. No. 81-0380 F, 1987 WL 7238 at *13 (D. Mass. Mar. 2, 1987) ("In analyzing a claim of retaliatory constructive discharge, plaintiff must show she was indeed retaliated against for asserting her rights under Title VII and that retaliation constituted intolerable work conditions leading to the alleged constructive discharge. Because the Court concludes plaintiff has failed to carry her burden of persuasion on the retaliation element, her constructive discharge claim must be denied.") (citation omitted). Consequently, since the Court has already determined, both in the prior case and in the instant case, that the complained-of actions fail to establish actionable retaliation, Plaintiff's constructive discharge claim based on retaliation must also fail. Moreover, even if a reviewing court were to disagree that the dismissal of Plaintiff's retaliation claims *necessarily* requires the dismissal of

his retaliatory constructive discharge claim, this Court alternatively finds that the acts alleged by Plaintiff fail to establish a constructive discharge as a matter of law.[11] *Martin v. Citibank, N.A.*, 762 F.2d 212, 221 (2d Cir. 1985).

CONCLUSION

Upon further consideration of this case in light of *Burlington N. & Santa Fe Ry. Co. v. White*, Plaintiff's applications (Docket Nos. [#9][#32]) are denied, Defendant's motion (Docket No. [#3]) for summary judgment is granted, and this action is dismissed.

SO ORDERED.

Dated: Rochester, New York
July 21, 2009

ENTER:

/s/ Charles J. Siragusa
CHARLES J. SIRAGUSA
United States District Judge

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11. For example, as discussed above at page 13, it appears from the timing of Plaintiff's purported constructive discharge that the "last straw" that actually caused him to resign was not any of the alleged retaliation set forth above, but instead, was his belief that Defendant had failed to pay his judgment creditors in connection with the settlement of his first lawsuit against Defendant. That allegation is not part of this case, and it is the Court's understanding that Plaintiff's belief in that regard was later shown to be mistaken.

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NEW YORK DATED SEPTEMBER 5, 2007 FILED SEPTEMBER 6, 2007

ROLAND JOHNSON,

Plaintiff,

-vs-

JOHN E. POTTER, Postmaster General, United States Postal Service,

Defendant.

No. 04-CV-6634 CJS

ORDER

This is an employment discrimination action alleging, in relevant part, retaliation in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), as amended, 42 U.S.C. § 2000e *et seq.* On September 16, 2005, the Court issued a Decision and Order [#21], granting defendant's application for summary judgment and denying plaintiff's cross-motion for leave to conduct discovery pursuant to Fed. R. Civ. P. 56(f). Plaintiff appealed, and on June 7, 2006, the United States Court of Appeals for the Second Circuit issued a Summary Order affirming this Court's decision. Plaintiff then applied for a writ of certiorari to the United States Supreme Court.

Appendix C

On June 22, 2006, the Supreme Court issued its decision in *Burlington N. & S.F.R. Co. v. White*, 548 U.S. 126 S.Ct. 2405 (2006). On June 25, 2007, the Supreme Court granted plaintiff's petition for writ of certiorari, vacated the judgment, and remanded the case to the Second Circuit "for further consideration in flight of" the *Burlington Northern* decision. On August 11, 2007, the Second Circuit Court of Appeals remanded the case to this Court "for further proceedings consistent with the order of the United States Supreme Court."

Accordingly, it is hereby

ORDERED. that if they wish to do so, the parties may each file and serve a memorandum of law, addressing the effect of the *Burlington Northern* decision on defendant's summary judgment motion, on or before October 5, 2007; and it is further

ORDERED, that once any submissions are received, the Court will decide whether to schedule oral argument.

SO ORDERED.

Dated: Rochester, New York
September 5, 2007

ENTER:

/s/ Charles J. Siragusa
CHARLES J. SIRAGUSA
United States District Judge

APPENDIX D — SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED AND FILED JUNE 7, 2006.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, at Foley Square, in the City of New York, on the 7th day of June, two thousand-six.

UNITED STATES COURT OF APPEALS
FILED
JUN 07 2006
Roseann B. MacKechnie, CLERK
SECOND CIRCUIT

Appendix D

PRESENT:
HON. JON O. NEWMAN,
HON. CHESTER J. STRAUB,
HON. ROBERT A. KATZMANN,
Circuit Judges,

ROLAND JOHNSON,

Plaintiff-Appellant,

v.

JOHN E. POTTER, Postmaster General,
UNITED STATES POSTAL SERVICE,

Defendants-Appellees.

SUMMARY ORDER
No. 05-5374-cv

Appeal from the United States District Court for the Western District of New York (Charles J. Siragusa, *Judge).*

AFTER ARGUMENT AND UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the District Court is AFFIRMED.

Johnson appeals from the judgment of the United States District Court for the Western District of New York (Charles J. Siragusa, *Judge),* granting defendant's

motion for summary judgment, denying Johnson's motion for a continuance of discovery pursuant to Federal Rule of Civil Procedure 56(f), and dismissing Johnson's complaint. Upon review of the record and applicable law, the judgment of the District Court is affirmed.

This is Johnson's third suit against the defendant Postmaster General under Title VII of the Civil Rights Act of 1964 ('Title VII'), as amended, 42 U.S.C. § 2000e *et seq.* All three of his suits have been before Judge Siragusa in the District Court. Johnson's first suit was brought in 1990, alleging a denial of promotion on the basis of race. It settled in 1998 following two days of trial. On January 15, 2002, Johnson filed a second suit *('Johnson II')* against defendant, alleging that he suffered retaliation for his first suit. Judge Siragusa granted summary judgment to defendant on February 28, 2005, and we affirmed by summary order on December 15, 2005.

While defendant's motion for summary judgment in *Johnson II* was pending, Johnson filed this suit, alleging retaliation and constructive discharge. Judge Siragusa granted defendant's motion for summary judgment in this case on September 16, 2005.

The District Court correctly determined that, in so far as Johnson alleged claims for retaliation that were or could have been raised in *Johnson II*, his claims were barred by res judicata. We agree with the District Court that Johnson's new allegations of retaliation, though not

barred by res judicata, were not sufficient to state a *prima facie* case of an "adverse employment action," which is necessary to any claim of retaliation under Title VII. *See Galabya v. New York City Bd. of Educ.*, 202 F.3d 636, 640 (2d Cir. 2000). We express no opinion as to the District Court's holding that Johnson's constructive discharge claim is in large part barred by collateral estoppel; however, we agree with the District Court's alternative holding that Johnson's allegations, even if taken as true, fall far short of establishing a constructive discharge. Johnson's allegations "do not legally suffice to sustain an inference that a reasonable person would have been 'compelled' to resign." *See Martin v. Citibank, N.A.*, 762 F.2d 212, 221 (2d Cir. 1985).

"[O]nly in the rarest of cases may summary judgment be granted against a plaintiff who has not been afforded the opportunity to conduct discovery." *Trammell v. Keane*, 338 F.3d 155, 161 n.2 (2d Cir. 2003). Nevertheless, we see no abuse of discretion in the District Court's denial of Johnson's motion for a continuance of discovery under Rule 56(f). Johnson had already enjoyed a full opportunity to conduct discovery in *Johnson II*. For the reasons carefully stated by the District Court, we agree that Johnson failed to identify any new facts as to which he needed discovery that might "reasonably [be] expected to raise a genuine issue of material fact." *Gualandi v. Adams*, 385 F.3d 236, 244 (2d Cir. 2004).

For the reasons set forth, we AFFIRM the order of the District Court.

Appendix D

FOR THE COURT:
Roseann B. MacKechnie, Clerk

By: s/Richard Alcantara 6/7/06
Richard Alcantara, Deputy Clerk DATE: 6/7/06

APPENDIX E — DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK, DATED SEPTEMBER 16, 2005

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ROLAND JOHNSON,

Plaintiff,

-vs-

JOHN E. POTTER, Postmaster General, United States Postal Service,

Defendant.

No. 04-CV-6634 CJS

DECISION AND ORDER

INTRODUCTION

This is an employment discrimination action alleging retaliation and constructive discharge in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), as amended, 42 U.S.C. § 2000e *et seq.* Now before the Court is defendant's motion [#3] to dismiss the amended complaint for failure to state a claim pursuant to Federal Rule of Civil Procedure ("Fed. R. Civ. P.") 12(b)(6), and alternatively, for summary judgment pursuant to Fed. R. Civ. P. 56, and plaintiff's cross-motion [#9] for leave

to conduct discovery [2] pursuant to Fed. R. Civ. P. 56(f). For the reasons that follow, defendant's application for summary judgment is granted, plaintiff's application is denied, and this action is dismissed.

BACKGROUND

This is the third employment discrimination lawsuit which the plaintiff has filed against the United States Postal Service. *See, Johnson v. Henderson,* 90-CV-7138 CJS and *Johnson v. Potter,* 04-CV-6239 CJS. Because they are relevant to the instant case, the Court will set forth the facts of the two previous lawsuits. Plaintiff is an African American male who was hired by the United States Postal Service in Buffalo, New York in 1985. In September 1989, plaintiff filed a complaint with the Postal Service's Equal Employment Opportunities Office, alleging that he had been denied a promotion to the position of "204B Supervisor" because of his race. At that time plaintiff's supervisor was Bill Mitchell ("Mitchell"). According to plaintiff, Mitchell promised plaintiff that he would be given another opportunity for promotion to 204B Supervisor, but later reneged on the promise. Plaintiff subsequently commenced a lawsuit in this Court pursuant to Title VII entitled *Roland C. Johnson, Jr. v. William J. Henderson, Postmaster General, United States Postal Service,* Case No. 90-CV-7138 CJS(F) ("case 90-CV-7138").

Plaintiff continued working at the Postal Service while his lawsuit proceeded. In or about September 1998, plaintiff was promoted to the position of Claims

and Inquiry Clerk, PS-5. At all relevant times thereafter, at the branch where plaintiff worked, there were two other Claims and Inquiry Clerks, Judith Grove ("Grove") and Diana Chandler ("Chandler"). Grove and Chandler held the same job classification as plaintiff, PS-5, but [3] had more seniority than plaintiff. Plaintiff's position was also referred to as "Lost and Found" and "Loose-In-The-Mails" clerk. In that capacity, plaintiff was responsible for handling items inadvertently mailed, dropped into mailboxes, or lost at the post office, such as bank envelopes containing cash and checks, as well as personal property such as purses, wallets, keys, gift certificates, and photographs. Plaintiff stored these items in a locked cabinet in his work area. Plaintiff was the only one of the three Claims & Inquiry Clerks who routinely handled lost and found money. Plaintiff also worked with a Kathy Deneka ("Deneka"), whose title was Complaints and Inquiry Clerk, PS-6. Plaintiff's supervisor was Maryann Molenda ("Molenda").

Plaintiff's lawsuit in case 90-CV-7138 was tried before the undersigned in November 1998. On the third day of the trial, the parties agreed to a complete settlement. In exchange for settling the lawsuit, defendant agreed to pay plaintiff $90,000.00 and restore 496 hours of sick leave. Plaintiff contends that after the lawsuit was settled, his immediate supervisor, Molenda, began to harass him and retaliate against him.

The alleged post-lawsuit harassment began with a disagreement between plaintiff and Molenda over the procedures plaintiff was to use for inventorying and storing certain items of mail. According to plaintiff,

> supervisor Molenda directed me to keep a special 'log' of every single time I went into my overhead cabinet where money and registered mail was kept, in addition to the normal log that identified 'Matters Without Address Found in the Mails' that I was required to keep. No other postal employee under Molenda's supervision was subject to this treatment; indeed, my predecessor Lester Morris was only required to maintain the 'Matters Without Address Found in Mails' log.

Johnson Aff., 04-CV-6239 [#45] ¶¶ 37-38. While plaintiff refers to "no other postal [4] employee being subject to such treatment," as indicated above, he was the only employee who routinely handled lost and found money. Plaintiff's specific objection was that his predecessor had not been required to keep such a log. Molenda described the event differently, stating that plaintiff

> was off from work for approximately 3 days during the early portion of November 1998. When he returned he stated his top drawer was opened and that he remembers locking it when he left. He mentioned that there are only two sets of keys; one he has and one I have. He requested I sign off that he is not responsible for missing items. I denied his request and he filed a grievance where an agreement was reached.

Id., Ex. W. Molenda made no reference to plaintiff having to keep a special "log." The agreement referred

to by Molenda, reached between the Postal Service and plaintiff's union, provided, in relevant part:

> Management agrees to implement the following actions:
>
> 1) Clerk will deposit all monies on a daily basis.
>
> 2) Management will establish a inventory log, for all loose in the mail items kept under lock and key. Clerk will annotate on the inventory log final disposition of all items.
>
> 3) Manager, Consumer Affairs will arrange to have locks changed on drawers and cabinets.
>
> 4) Grievant's supervisor will maintain duplicate key. Whenever duplicate key is issued, the Mgr CA will record the individual name, time/date, and return time/date.

Id., Ex. E. Notably, while plaintiff claimed that he filed the grievance in response to Molenda requiring *him* to establish a log, the subsequent agreement required the postal service to "establish" such a log, and defendant maintains that plaintiff was only required to keep the log as the result of this agreement.

In May 1999, Karl Anderson ("Anderson"), one of plaintiff's supervisors, [5] commented that plaintiff's work area was "the dark side of the room." Plaintiff insists that this was a racial slur, although Anderson

maintains that he was making a joke based upon the movie "Star Wars." In papers submitted in connection with a summary judgment motion, plaintiff suggested that Anderson's comment was racially motivated because plaintiff and another black employee were the only African-Americans on the side of the room to which Anderson was referring. However, in a deposition, plaintiff testified that there were African Americans stationed on both sides of the room when Anderson made his remark.

On or about May 27, 1999, plaintiff and his union representative met with the Postal Service's District Manager, Nicholas Fabozzi ("Fabozzi"), to discuss the alleged harassment by Molenda and the "dark side" comment by Anderson. Plaintiff alleges that during the meeting, Fabozzi stated that he "used to participate in the telling of racial jokes" and that it had been "no problem."

On or about December 2, 1999, Molenda left a post-it note on plaintiff's telephone, directing him to forward calls when he was away from his desk. Plaintiff contends that he was singled out in this regard, and that Molenda did not tell other employees to forward their calls until after he complained of disparate treatment. Molenda, however, maintains that she left similar notes on all of her employees' phones at different times.

In January 2000, plaintiff claims that he overheard Grove and Deneka having a conversation in which they made comments which, although not about him, he found

racially-offensive. Plaintiff states that "they were speaking about 'blacks not wanting to work and standing on the corner selling drugs and stuff.'" Plaintiff reported the incident to [6] Molenda, who responded by issuing a memo that stated:

> It has come to my attention that employee(s) are using profane or obscene language in the office. This type of behavior will not be tolerated by management. This language is offensive to others. We must keep in mind that this office is a customer service officer, where at no given time [sic], customers are in our office or on the telephone who may also hear this type of language. This also relates to conversations amongst one another (when other can hear you) that may be offensive to others. Our workplace is a professional place of business and we must conduct ourselves in this manner. Thank you for your cooperation.

Pl. Supp. Appendix, 04-CV-6239 [#80], Ex. L. Although this memo was addressed to all of the employees in the office, and was sent to address plaintiff's complaint, plaintiff insists that the memo singled him out to be reprimanded in retaliation for having complained.

On or about February 16, 2000, Molenda told plaintiff to "drop everything" and handle claims while she and Deneka "had a personal conversation over coffee in her office." On or about March 6, 2000, plaintiff and his union representative again met with Fabozzi to complain about

what plaintiff viewed as a continuing pattern of harassment by Molenda, as well as her preferential treatment of Deneka. During the conversation, Fabozzi again referred to his having told racial jokes in the past. Plaintiff asked that Molenda be required to attend "sensitivity training," but Fabozzi dismissed the idea.

On or about August 18, 2000, Molenda called a unit meeting and announced that she was taking duties that had been performed by the Claims and Inquiry department in Rochester, and was adding them to the Buffalo Claims & Inquiry department. Molenda, in her affidavit submitted in connection with the EEO investigation, described the situation as follows:

> I also had 2 Claims & Inquiry clerk positions in Rochester. Due to [7] technology, the workload diminished and those 2 positions were abolished. An 800 line was put in for Rochester customers to call and that line is on all 3 level 5 Claims & Inquiry clerks phones in Buffalo, not just Roland's. A light blinks when there is a call and the first to pick it up takes the call. If no one answers, it rolls over to Claims & Inquiry Clerk Bill Maturski's voice mail. The line is not on the level 6's phone (Kathy Deneka's) since the intent of the line was to assist customers in Rochester with Claims & Inquiry (level 5 positions).

Pl. Appendix to Local Rule 56.1 Counterstatement 04-CV-6239 [#71], Ex. T. Plaintiff initially alleged that

Molenda used the occasion to retaliate against him by assigning additional duties only to him. However, he later admitted that the other PS-5 Claims and Inquiry Clerks were also given additional duties similar to the ones he was given. Nonetheless, plaintiff continued to claim that Deneka, was treated preferentially because she did not receive any additional PS-5 work, even though she was a PS-6 clerk.

Plaintiff also claimed he told Molenda that he was overwhelmed with work and asked for her help, but she refused. According to plaintiff, Molenda said that, if anything, she would consider creating an additional position for someone to assist Deneka in her work.

On August 25, 2000, plaintiff filed another EEO charge. In the EEO complaint, plaintiff described an incident on August 18, 2000, as follows:

> I was 'combatively' approached by Consumer Affairs Manager Maryann Molenda. She remarked, 'I need to review the way you are doing things, especially the way you handle the money.' This overt racist statement has numerous + frequent [sic] since Sept. 1998.

PI. Appendix to Local Rule 56.1 Counterstatement of Facts, 04-CV-6239 [#71], Exhibits I & U. However, plaintiff subsequently gave a different version of those events:

> Immediately *after* Plaintiff filed his August 25, EEO charge, Molenda aggressively

> approached Plaintiff in front of others and remarked 'I want to review the way you are doing things, *the way you are doing them is* [8] *probably wrong.*' (Exhibit A, p. 107, Lines 20-23).

Johnson Aff., 04-CV-6239 [#66] ¶ 70.

Plaintiff alleged that Molenda subsequently had him bring trays of mail to her for inspection, and kept lists of his tasks, but did not do so for other employees. Plaintiff also claimed that Molenda continued to scrutinize his handling of money. Plaintiff further maintained that Molenda then made a list of his activities, and gave it to the union as proof that plaintiff "did not have enough work to do." On August 30, 2000, Molenda directed that certain work which plaintiff had been performing be performed by another unit known as the "Nixie Unit." On October 11, 2000, Molenda directed the Nixie Unit not to send trays of mail to plaintiff, purportedly to avoid double handling. Molenda also told plaintiff not to continue his usual practice of retrieving mail from the Nixie Unit for processing, because she would get it herself. According to Molenda,

> everyone's work was monitored, tallied, counted and recorded, not just Roland's. This was done primarily because of the changes that occurred in Claims & Inquiry workload being done electronically in addition to other changes that HQ made nationally that affected Claims & Inquiry workload. With the

> ["]loose in the mails["] which Roland works on, I wanted to see what Nixie [Unit] rewrap was giving him. [Nixie Unit has] been know to use us as a dumping ground. I have done this practice with the previous claims and inquiry clerk who now is retired. As a manager, the above monitoring should occur to know the workload and to correct any deficiencies found.

PI. Appendix to Local Rule 56.1 Counterstatement 04-CV-6239 [#71] Ex. T. Plaintiff, however, claimed that Molenda was scrutinizing his work in order to harass him, and in order to decrease his workload so that she could justify eliminating his position.

In February 2001, Molenda sent a letter to the president of plaintiff's labor union and to the Postal Service's labor relations specialist, notifying them that she intended to [9] eliminate plaintiff's PS-5 position and create a new PS-6 position. Molenda's letter stated:

> This letter is to officially notify you, as outlined in Article 37 of the National Agreement, that position 2336157, Claims & Inquiry Clerk, currently held by Roland Johnson, is under consideration to be rescinded and to post a Complaints & Inquiry Clerk position, level 6. The workload for Claims & Inquiry Clerks [PS-5] will continue to decrease and the workload impacted by the following events:

Appendix E

In Fall of 2000, signature capture (electronic filing) took place. This sharply reduced the workload for Claims & Inquiry eliminating the manual filing and the manual lookups for accountable mail.

Because of the electronic filing of accountable mail, filing claims is conducted in a shorter time frame.

Effective September 1999, the Postal Inspection Service changed the procedures in handling PS Form 1510 (mail loss/rifling report) which sharply reduced the workload for Claims & Inquiry.

A decrease in claims being processed took effect in 1997 because of local adjudication with unnumbered claims. Streamlining efforts on overall claims process is under review by Headquarters.

The National Call Centers that are in place and their continued national roll out will impact the number of calls.

Headquarters is currently identifying process improvements

> for handling loose in the mail items at the point of discovery. A finished product should be seen sometime in Spring.
>
> The workload for *Complaints* & Inquiry [PS-6] has steadily increased. Customers have additional means in contacting us with their service issues th[a]n just by telephone or in writing. Service issues are also received electronically through the National Call Centers and the Internet. A review of the workload by the Claims & Inquiry Clerks and Complaints & Inquiry Clerk has been conducted and warrants this decision. I am asking for your input by February 21, 2001.

Molenda Aff., 04-CV-6239 [#79] Ex. A (emphasis added). There is no indication in the [10] record that the union responded to this letter. On or about February 14, 2001, Molenda told plaintiff that she was going to eliminate his position, and create a new Complaints and Inquiry Clerk position as a PS-6 position, for the purpose of assisting Deneka. On March 7, 2001, Molenda notified the union that she was going to "revert" plaintiff's position and post a new PS-6 position. Plaintiff complained that plaintiff was singling him out for retaliation. In response to that charge, Molenda told the EEO that

> Roland is taking this personally. It is not HIS position I want to eliminate. I observed that

> there was not enough work for 3 level 5 Claims & Inquiry clerks, however, there was enough workload for another Complaints & Inquiry Clerk position. This occurred because of workload and volume that I conducted [sic] for several months when changes began in Claims & Inquiry workload due to HQ changes made nationally. While it is true, that because Roland is the junior employee, it will be the position he occupies, but the reason for that is contractual, not personal, based on unit seniority.

Pl. Appendix to Local Rule 56.1 Counterstatement, 04-CV-6239 [#71] Ex. T. Plaintiff claimed that Molenda's proposal violated the collective bargaining agreement between the union and the postal service. However, the union did not support him in that regard. Plaintiff subsequently filed complaints with both the union and the Merit System Protection Board. On April 30, 2001, the postal service advised plaintiff that it was "rescinding" its attempt to eliminate the position at the time, but would review the matter in six months.

On May 21, 2001 plaintiff filed another EEO complaint. This time he alleged retaliation by Molenda.

On July 23, 2001, plaintiff claimed that someone sabotaged his telephone by placing a sticky glue-like substance on it. Plaintiff had no idea what was on the phone or how it came to be there. In response, the postal service replaced the phone. At around [11] this same

time, all the members of plaintiff's work unit were assigned new telephone extension numbers. Plaintiff alleged that his co-workers received their new numbers before him, although he could not say how long he had to wait for his number. He also claimed that after he was assigned a new telephone number, he received fewer phone calls.

On August 15, 2001, Molenda went on leave and appointed Deneka to handle certain tasks while she was away, such as collecting leave slips. On August 17, 2001, plaintiff gave a leave slip to Deneka. Plaintiff's request was apparently not transmitted to the appropriate person, and as a result, he lost 2 hours of pay. However, he was reimbursed for the error.

On October 19, 2001, the EEO issue a final order dismissing all of plaintiff's claims of harassment and retaliation.

In November 2001, the lock on plaintiff's desk drawer became stripped. Plaintiff complained that this was an act of vandalism, although he had no idea nor any proof as to how the damage occurred. Plaintiff stated that he never checked to see if anything had been taken from the drawer. On or about December 10, 2001, someone placed a note saying "keep out" on plaintiff's work cubicle.

In January 2002, plaintiff commenced his second lawsuit, *Johnson v. Potter*, 02-CV-6025, which was later re-numbered as case number 04-CV 6239 ("case 04-CV-

6239"). In that case, plaintiff alleged that the foregoing instances of alleged mistreatment constituted retaliation under Title VII.

On or about November 29, 2002, the office Marketing Manager, Laura Lewis ("Lewis"), promoted Deneka to the position of Customer Service Representative, EAS-[12]13. Plaintiff claimed that Deneka's promotion was retaliatory, since he was never notified of the opening, and since Deneka's promotion made his job less secure. However, plaintiff subsequently admitted that he had been out of work on sick leave when Deneka was promoted, and did not know whether or not the position had been posted. Plaintiff also did not explain how Deneka's promotion made his position less secure. On the other hand, defendant submitted proof that the position had been posted and that as a result of the posting, six individuals applied for the position.

At some point between March 2002 and February 14, 2003, plaintiff made a claim under the Family Medical Leave Act ("FMLA"). According to plaintiff, he was required to submit "excessive documentation" in support of his FMLA claim. Nonetheless, plaintiff's FMLA leave request was apparently granted.

On February 18, 2003, plaintiff's pay check was short by $115. After notifying his supervisors of the error, plaintiff was reimbursed the $115 a few days later. Although plaintiff claimed the shorting of his pay was intentional, he admitted that he had no proof to support his theory.

Appendix E

On April 8, 2003, plaintiff filed an Amended Complaint [H20], which served as the operative complaint throughout the remainder of case number 04-CV-6239. The complaint alleged "an ongoing pattern of retaliation."[1]

On April 21, 2003, plaintiff filed an EEO complaint regarding the FMLA claim, the one-day pay shortage, and Deneka's promotion.

On or about April 24, 2003, plaintiff wrote a letter to Lewis accusing her of [13] sexually harassing him. Lewis asked plaintiff to discuss the letter, but plaintiff refused. Sometime after that, Lewis confronted plaintiff and said, "why don't you be a man and talk about the letter." Lewis further stated that plaintiff's problem was that he was "seeing dollar signs," and that "it wasn't going to happen off her career." Lewis further said that "she was aware that Plaintiff was afraid of losing his job, but that if anyone were to be fired, he would be the first to go." Although plaintiff characterizes this last statement as a retaliatory threat, he admits that he was the least senior of the Complaint and Inquiry Clerks, and that if "any of the three Claims and Inquiry positions need[ed] to be abolished ... [he] would be the next person in line to be terminated because of [his] lack of seniority."[2]

Plaintiff left work on sick leave in May 2003, and never returned. Plaintiff resigned his position on August

1. *Id.* at ¶ 168

2. *See,* 04-CV-6634, Amended Complaint [#2], ¶¶ 164-65.

15, 2003. On September 5, 2003, plaintiff filed a request for EEO "pre-complaint counseling," alleging that he had been constructively discharged. Plaintiff stated that his alleged constructive discharge "comes after persistent management harassment and a 8/13/03 + 8/14/03 revelation that an 'involuntary deduction' of $6,808.00 by the agency to pay my creditors during a 1998 civil trial, has not been paid."

In May 2004, some nine months after plaintiff claims that he was constructively discharged, plaintiff moved before this Court for leave to file a second amended complaint in case 04-CV-6239. The proposed second amended complaint contained a claim for constructive discharge, and also included allegations of retaliation by Lewis [14] concerning her comments to him in April 2003. The Court denied the application to amend, finding that plaintiff failed to demonstrate good cause for his delay in failing to move to amend the complaint beyond the deadline set by the Court.

After having a full opportunity to conduct discovery, the parties each subsequently moved for summary judgment in case 04-CV-6239. By Decision and Order [#83] filed on March 2, 2005, the Court denied plaintiff's application for summary judgment, granted defendant's application, and dismissed the action. In connection with those cross motions, it was undisputed that plaintiff had engaged in protected activity. However, defendant asserted that none of the alleged acts of retaliation amounted to an "adverse employment action" under Title VII. Plaintiff, relying on the Second Circuit's

decision in *Richardson v. New York State Dep't of Correctional Servs.*, 180 F.3d 426, 436 (2d Cir. 1999), argued that the adverse employment action consisted of "unchecked retaliatory co-worker harassment." Plaintiff alternatively asserted that the alleged retaliatory acts by Molenda constituted adverse employment actions. The Court rejected the "unchecked retaliatory co-worker harassment" theory, finding that plaintiff had failed to come forward with evidence that the alleged harassment by co-workers was either retaliatory or unchecked. The Court also found that defendant was entitled to judgment regarding the alleged retaliation by Molenda, in some instances because plaintiff had failed to demonstrate a prima facie case, and in other instances because plaintiff failed to come forward with evidentiary proof, establishing that the defendant's proffered reasons were false or pretextual. The Court's summary judgment decision in case number 04-CV-6239 addressed all of the alleged acts of retaliation discussed above, except for the two which plaintiff did not assert in that case: 1) the claim that plaintiff was [15] required to submit excessive documentation in support of his FMLA claim; and 2) the claim that Lewis retaliated against plaintiff in April 2003 by threatening his job.

While the summary judgment motions were pending in case number 04-CV-6239, plaintiff filed the subject action on December 29, 2004. The complaint in this action sets forth the allegations of retaliation involving the FMLA claim and the alleged threats by Lewis, along with all of the allegations of retaliation involving the

FMLA claim and the alleged threats by Lewis, along with all of the allegations of retaliation that were raised in case number 04-CV-6239. Based upon the allegations, plaintiff asserts two causes of action: retaliation and constructive discharge. Amended Complaint [#2] ¶¶ 179-87. With regard to the retaliation claim, the complaint states, in relevant part:

> Plaintiff engaged in protected activity when he made both informal and formal EEO complaints on March 19, 2003, April 21, 2003, May 15, 2003, [and] June 12, 2003. Shortly thereafter, he was subject to adverse employment action, including threats to terminate his position, falsifying his time card,[3] and ultimately, his constructive discharge in retaliation for having engaged in said protected activity.

Amended Complaint [#2], ¶ 180. Based upon the dates contained in the paragraph above, the retaliation claim is based solely upon alleged adverse employment actions occurring on and after March 19, 2003. The constructive discharge claim, on the other hand, is based upon all of the instances of alleged retaliation discussed above, including those occurring prior to March 19, 2003. In other words, with the exception of the FMLA incident and the alleged harassment by Lewis, the constructive

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3. The alleged falsification of plaintiff's time card actually occurred in February 2003. See Amended Complaint [#2] ¶¶ 123, 167, 169.

discharge claim how before the Court is based on the same alleged acts of retaliation which the Court dismissed in case number 04-CV-6239. [16]

Prior to conducting any discovery in this action, defendant filed the subject motion seeking dismissal and/or summary judgment. Defendant contends that the retaliation claim must be dismissed for several reasons. First, defendant contends that the acts of alleged retaliation are barred by collateral estoppel, except for two, the FMLA incident and the alleged threats by Lewis. And, as to those two incidents, defendant contends that plaintiff failed to establish a prima facie case of retaliation, since plaintiff suffered no adverse employment action. Defendant further notes that the FMLA incident is not retaliatory for two additional reasons: first, the FMLA incident pre-dated the protected activity alleged by plaintiff, and second, there is no evidence that the employee who supposedly requested "excessive documentation" from plaintiff was even aware of plaintiff's protected activity. Defendant also contends that the constructive discharge claim should be dismissed for several reasons. First, defendant contends that, since the incidents which plaintiff relies on in support of his constructive discharge claim are the same incidents of alleged retaliation that the Court already dismissed, the constructive discharge claim is barred by collateral estoppel. More specifically, defendant contends that since the incidents of alleged retaliation did not amount to "adverse employment actions," they necessarily fall short of establishing the aggravated circumstances required to establish a

constructive discharge. Alternatively, defendant contends that in any event, the acts of alleged retaliation upon which the constructive discharge claim is based fail, as a matter of law, to establish a constructive discharge. Lastly, defendant argued that the constructive discharge claim had not been timely filed with the EEOC, and also had not been administratively exhausted.

In response to defendant's motion, plaintiff has filed an application under Rule [17] 56(f). Plaintiff states that he needs to conduct discovery before responding to defendant's motion, primarily so that he can establish that his constructive discharge claim was both timely filed with the EEOC and administratively exhausted. Plaintiff also requests leave to obtain discovery from his own doctors, so that he can establish that it was medically necessary for him to resign from his position.

Defendant subsequently filed a reply, in which he concedes, for purposes of the subject motions, that plaintiff's constructive discharge claim was both timely and administratively exhausted. Defendant maintains, however, that plaintiff is not entitled to discovery, and that the case should be dismissed.

On August 18, 2005, counsel for the parties appeared before the undersigned for oral argument of the subject motions. Notably, during oral argument, plaintiff's counsel argued that acts which fail to rise to the level of "adverse employment actions" under Title VII may nonetheless establish a constructive discharge.

Appendix E

Following oral argument the Court permitted plaintiff's counsel to supplement her brief on that issue of law. The Court has now thoroughly considered the parties' submissions and the arguments of counsel.

STANDARDS OF LAW

Rule 56

The standard for granting summary judgment is well established. Summary judgment may not be granted unless "the pleadings, depositions, answers to interrogatories, and admissions to file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). A party seeking summary judgment [18] bears the burden of establishing that no genuine issue of material fact exists. *See, Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). "[T]he movant must make a prima facie showing that the standard for obtaining summary judgment has been satisified." 11 Moore's Federal Practice, §56.11[1][a] (Matthew Bender 3d ed.). "In moving for summary judgment against a party who will bear the ultimate burden of proof at trial, the movant may satisfy this burden by pointing to an absence of evidence to support an essential element of the nonmoving party's claim." *Gummo v. Village of Depew*, 75 F.3d 98, 107 (2d Cir. 1996) *(citing Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986)), *cert denied*, 517 U.S. 1190 (1996). Once that burden has been established, the burden then shifts to the non-moving

party to demonstrate "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). To carry this burden, the non-moving party must present evidence sufficient to support a jury verdict in its favor. *Anderson*, 477 U.S. at 249. The parties may only carry their respective burdens by producing evidentiary proof in admissible form. Fed. R. Civ. P. 56(e). The underlying facts contained in affidavits, attached exhibits, and depositions, must be viewed in the light most favorable to the non-moving party. *U.S. v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). Summary judgment is appropriate only where, "after drawing all reasonable inferences in favor of the party against whom summary judgment is sought, no reasonable trier of fact could find in favor of the non-moving party." *Leon v. Murphy*, 988 F.2d 303, 308 (2d Cir. 1993).

When a party is unable to produce affidavits in opposition to a summary judgment [19] motion, she may make an application pursuant to Rule 56(f), which states:

> When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion [for summary judgment] that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Fed. R. Civ. P. 56(f). In this Circuit, the requirements for obtaining relief under Rule 56(f) are as follows:

> [A] party resisting summary judgment on the ground that it needs discovery in order to defeat the motion must submit an affidavit showing '(1) what facts are sought [to resist the motion] and how they are to be obtained, (2) how those facts are reasonably expected to create a genuine issue of material fact, (3) what effort affiant has made to obtain them, and (4) why the affiant was unsuccessful in those efforts.

Miller v. Wolpoff & Abramson, L.L.P., 321 F.3d 292, 303 (2d Cir. 2003) (citations omitted).

A district court's decision to deny a request for additional discovery under Rule 56(f) is reviewed on appeal using the "abuse of discretion" standard. *Gualandi v. Adams*, 385 F.3d 236, 244-245 (2d Cir. 2004). However, in this regard, it is clear that as a general rule, summary judgment is strongly disfavored where the non-moving party has had no opportunity to conduct discovery. *Trammell v. Keane*, 338 F.3d 155, 161 (2d Cir. 2003) ("[O]nly in the rarest of cases may summary judgment be granted against a plaintiff who has not been afforded the opportunity to conduct discovery.") *(quoting Hellstrom v. U.S. Dep't of Veterans Affairs*, 201 F.3d 94, 97 (2d Cir. 2000); *see also, Abercrombie & Fitch Stores, Inc. v. American Eagle Outfitters, Inc.*, 280 F.3d 619, 627 (6th Cir. 2002) ("If the non-movant

makes a proper and timely showing of a need for [20] discovery, the district court's entry of summary judgment without permitting him to conduct any discovery at all will constitute an abuse of discretion.").

Title VII

"Title VII makes it unlawful for an employer to discriminate against any individual with respect to the 'compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin.'" *Richardson v. New York State Department of Correctional Services*, 180 F.3d 426, 436 (2d Cir. 1999) (citations omitted). However, "Title VII does not establish a 'general civilty code' for the American workplace. Simple teasing, offhand comments, or isolated incidents of offensive conduct (unless extremely serious) will not support a claim of discriminatory harassment." *Petrosino v. Bell Atlantic*, 385 F.3d 210, 223 (2d Cir. 2004) (citation omitted).

Title VII Retaliation

To establish a prima facie case of retaliation under Title VII, "a plaintiff must demonstrate participation in protected activity known to the defendant, an employment action disadvantaging the person engaged in the protected activity, and a casual connection between the protected activity and the adverse employment action." *Cruz v. Coach Stores, Inc.*, 202 F.3d 560, 566 (2d Cir. 2000) (citations and internal quotations omitted). Making a complaint regarding harassment to one's supervisor is "protected activity" under Title VII. *Id.*

Appendix E

To make a prima facie showing of an adverse employment action, the plaintiff must show that the employer's actions caused a materially adverse change in the terms and conditions of employment. *Valentine v. Standard & Poors*, 50 F.Supp.2d 262, 283 [21] (S.D.N.Y. 1999), *aff'd*, 205 F.3d 1327 (2d Cir. 2000). Things such as "negative evaluations alone, without any accompanying adverse result, are not cognizable." *Id.* It is well settled that

> [t]o be materially adverse a change in working conditions must be more disruptive than a mere inconvenience or an alteration of job responsibilities. A materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices unique to a particular situation.

Galabya v. New York City Bd. of Educ., 202 F.3d 636, 640 (2d Cir. 2000) (Citations and internal quotations omitted). There is no "bright-line rule" for identifying an adverse employment action, rather, "courts must pore over each case to determine whether the challenged employment action reaches the level of 'adverse.'" *Richardson*, 180 F.3d at 446.

Title VII Constructive Discharge

The elements of a claim for constructive discharge are as follows:

Appendix E

> A constructive discharge occurs when the employer, rather than acting directly, deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation. In determining whether or not a constructive discharge has taken place, the trier of fact must be satisfied that the working conditions would have been so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign.

Pena v. Brattleboro Retreat, 702 F.2d 322, 325 (2d Cir. 1983) (Citations and internal quotation marks omitted).

However,

> [a] constructive discharge generally cannot be established...simply through evidence that an employee was dissatisfied with the nature of his assignments...Nor is it sufficient that the employee feels that the quality of his work has been unfairly criticized...Nor is the standard for constructive discharge merely whether the employee's working conditions [22] were difficult or unpleasant.

Stetson v. NYNEX Service Co., 995 F.2d 355, 360-361 (2d Cir. 1993) (citations and internal quotation marks omitted). Instead, the plaintiff "must show that the abusive working environment became so intolerable that her resignation qualified as a fitting response."

Appendix E

Pennsylvania State Police v. Suders, 542 U.S. 129, 124 S.Ct. 2342, 2347 (2004).

Title VII discrimination and retaliation claims are analyzed under the three-tier burden-shifting test "set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), and its progeny." *Valentine v. Standard & Poors*, 50 F.Supp2d at 281-82 (S.D.N.Y. 1999) (Citations and internal quotations omitted). Under the first tier of the *McDonnell Douglas* test, the plaintiff must establish a prima facie case. If the plaintiff establishes his prima facie case[4], the burden shifts to the employer to articulate some legitimate, nondiscriminatory reason for the employee's discharge. At this stage, the employer need only articulate — but need not prove — the existence of a nondiscriminatory reason for its decision. If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted, and the factual inquiry proceeds to a new level of specificity. Once defendant meets its burden of production, the burden shifts back to plaintiff. Under the third tier of the *McDonnell Douglas* test, plaintiff bears the ultimate burden of proving that the reason proffered by the employer is a pretext for unlawful discrimination. In order to survive a motion for summary

4. It is clear that "the burden of proof that must be met to permit an employment-discrimination plaintiff to survive a summary judgment motion at the prima facie stage is *de minimis*." *Chambers v. TRM Copy Centers Corp.* 43 F.3d 29, 37 (2d Cir. 1994) (emphasis in original, citation and internal quotation marks omitted).

judgment, plaintiff must establish a genuine issue of material fact as to whether the employer's reason for discharging her is false and as to whether it is more likely that a discriminatory reason motivated the employer to make the adverse employment decision.

Valentine, 50 F.Supp.2d at 281-82 (Citations and internal quotations omitted).

Courts must be "particularly cautious about granting summary judgment to an employer in a discrimination case when the employer's intent is in question. Because direct evidence of an employer's discriminatory intent will rarely be found, affidavits and depositions must be carefully scrutinized for circumstantial proof which, if believed, would show discrimination." *Schwapp v. Town of Avon*, 118 F.3d 106, 110 (2d Cir. 1997)(Citations and internal quotations omitted). However, a plaintiff may not defeat a motion for summary judgment merely by relying upon "purely conclusory allegations of discrimination, absent any concrete particulars." *Meiri v. Dacon*, 759 F.2d 989, 998 (2d Cir. 1985), *cert. den.* 474 U.S. 829.

ANALYSIS

Applying the foregoing principles of law to the facts of this case, the Court finds, at the outset, that plaintiff's cross-motion under Rule 56(f) should be denied. The Court is mindful that, as discussed above, a Rule 56(f) application should ordinarily be granted where the plaintiff has conducted no discovery. *See, e.g., Czerw v.*

Appendix E

Ronald Billitier Elec., Inc., 03-CV-6613 (CJS) & 03-CV-6614 CJS, 2005 WL 1159425 at *8 (W.D.N.Y. May 17, 2005) (Siragusa, J.) ("[A] grant of summary judgment before any discovery has been conducted would be inappropriate, since plaintiff has not had a fair opportunity to show that defendants' articulated reasons are pretextual."). However, the instant case is unusual in that plaintiff already had a full opportunity to conduct discovery in the prior proceeding between these parties involving essentially the same claims. *Sty-Lite Co. v. Eminent Sportswear Inc.*, No. 01 Civ. 3320 (CBM), 2002 WL 15650 at *5 (S.D.N.Y. Jan. 7, 2002) ("[A]lthough it is technically true that no discovery has taken place in the *present* incarnation of this case, [plaintiff] had ample opportunity to conduct full [24] discovery in the identical *prior action*.") (emphasis in original). In fact, the parties were conducting discovery in case number 04-CV-6239 as late as August 2003, and plaintiff was deposed by defendant on August 14, 2003, the day before plaintiff resigned his position. Accordingly, the Court does not view this case as one in which plaintiff has had no opportunity to conduct discovery, but on the contrary, views it as a case where plaintiff has already had a full opportunity to do so. Nor does the Court believe that the additional discovery which plaintiff seeks would be helpful. Most notably, the discovery that plaintiff wants to obtain largely pertains to the timeliness of his constructive discharge claim, and to the administrative exhaustion of that claim. However, that discovery is unnecessary, since as discussed above, defendant concedes, for purposes of this motion, that the claim is both timely and administratively exhausted.

As for the "discovery" that plaintiff wants to obtain from his own doctors, the Court sees no reason why plaintiff could not have obtained such evidence already, since, in addition to being available to him directly through the doctors, the information that he references is also part of the administrative record in his social security disability case. In any event, that information, purportedly detailing plaintiff's subjective reactions to the alleged harassment, would be irrelevant, since the standard to be applied in a constructive discharge case is an objective one. For all of these reasons, plaintiff's cross-motion under Rule 56(f) is denied. Plaintiff's alternative request for additional time to respond to the summary judgment motion, in the event that the Court rejected his Rule 56(f) application, is also denied. *See, Players, Inc. v. City of New York*, 371 F.Supp.2d 522,534 (S.D.N.Y. 2005) (discussing reasons why a plaintiff whose Rule 56(f) application fails is not necessarily entitled to an additional opportunity to oppose the summary [25] judgment motion). Plaintiff made a tactical decision to proceed in the manner that he did in this case, and the Court declines to extend the briefing schedule. *See, Id.*

Next, turning to the merits of defendant's summary judgment motion, the Court finds that defendant is entitled to summary judgment on plaintiff's retaliation claims. The Court previously granted summary judgment to defendant on all of the very same claims of retaliation alleged here except for two, the FMLA incident and the alleged threats by Lewis. Moreover, as to the FMLA claim, plaintiff had an opportunity to include that claim in the previous action, but chose not

to do so. Specifically, plaintiff was obviously aware of the FMLA incident at the time he amended his complaint in case number 02-CV-6239 on April 8, 2003. Consequently, that claim, as well as all of the claims of retaliation that the Court specifically addressed in the prior action are barred by res judicata. *Monahan v. New York City Dept. of Corrections*, 214 F.3d 275, 284-285 (2d Cir. 2000) ("The doctrine of res judicata, or claim preclusion, holds that a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action.").

Even assuming, however, that the FMLA claim were not barred by res judicata, defendant would still be entitled to summary judgment. Plaintiff has not established a prima facie case of retaliation concerning the FMLA incident for at least two reasons. First, plaintiff suffered no adverse employment action, but rather, he claims only that he was required to submit what he viewed as "excessive documentation" in support of his FMLA claim. Second, plaintiff has come forward with no evidence to refute the affidavit of the FMLA claim administrator, who states that he was unaware of plaintiff's protected activity.

[26] Similarly, plaintiff has failed to demonstrate a prima facie case of retaliation concerning the alleged threats by Lewis. Specifically, even accepting that Lewis told plaintiff to "be a man," that she told him he was "seeing dollar signs," and that she threatened him by telling him that "if anyone was fired, he would be the

first to go," these incidents do not establish an adverse employment action, either separately or together. Plaintiff does not claim to have suffered any concrete injury. Even assuming, arguendo, that the most serious allegation, Lewis' alleged threat, met the low threshold for a prima facie showing, defendant came forward with a legitimate non-discriminatory reason for Lewis' comment about plaintiff being "the first to go," which is that he was the PS-5 clerk with the least seniority. Moreover, defendant has presented evidence that the elimination of plaintiff's position, even though it never occurred, was warranted for legitimate business reasons. Namely, the PS-5 clerks had too little work to do, and the PS-6 clerk had too much. Plaintiff has not come forward with any evidentiary proof in admissible form to the contrary. Accordingly, defendant is entitled to summary judgment on plaintiff's retaliation claims.

The Court will now consider plaintiff's constructive discharge claim. The Court finds that where, as here, a plaintiff is claiming that he was constructively discharged based upon acts of retaliation,[5] the acts complained of must actually constitute retaliation under Title VII. In *Suders*, the Supreme Court dealt with "one subset of Title VII constructive discharge claims: constructive discharge resulting from sexual [27]

5. *See*, Amended Complaint [#2] ¶ 4 (Plaintiff alleged that he was "subject to an ongoing pattern of retaliation between March 2002 through February 14, 2003 which then culminated in his constructive discharge on August 14, 2003.") Plaintiff has never asserted in his lawsuits before this Court that he was subjected to a hostile work environment.

harassment, or "hostile work environment." *Pennsylvania State Police v. Suders,* 124 S.Ct. at 2352. The Supreme Court further noted that, "[c]reation of a hostile work environment is a necessary predicate to a hostile-environment constructive discharge case." *Id.* at 2356. Presumably then, when dealing with a claim for constructive discharge resulting from retaliation, actual retaliation is a necessary predicate. *See, Downey v. Issac,* 622 F.Supp. 1125, 1133 (D.D.C. 1985) ("In sum, in a retaliatory constructive discharge case, a *plaintiff must show that he/she was retaliated against* because of his/her E.E.O. activity and that retaliation constituted intolerable working conditions in which a reasonable person in similar circumstances would have felt compelled to resign.") (emphasis added), *aff'd without opinion* 794 F.2d 753 (D.C. Cir. 1986); *Delashmutt v. Wis-Pak Plastics, Inc.,* 990 F.Supp. 689, 697 (N.D. Iowa 1998) (Stating, regarding "constructive discharge as the result of retaliatory conduct," that "if [a plaintiff] cannot prove retaliation, because she cannot prove any adverse employment action, then she necessarily cannot prove her employer made her working environment so intolerable as to establish any independent constructive discharge claim.") (emphasis added); *Amato v. Package Machinery Co.,* Civ. A. No. 81- 0380 F, 1987 WL 7238 at *13 (D. Mass. Mar. 2, 1987) ("In analyzing a claim of retaliatory constructive discharge, plaintiff must show she was indeed retaliated against for asserting her rights under Title VII and that retaliation constituted intolerable work conditions leading to the alleged constructive discharge. Because the Court concludes plaintiff has failed to carry her burden of persuasion on

the retaliation element, her constructive discharge claim must be denied.") (citation omitted). Consequently, since the Court has already determined, [28] both in the prior case[6] and in the instant case, that the actions complained of fail to establish actionable retaliation, plaintiff's constructive discharge claim based on retaliation must also fail. Moreover, even if a reviewing court were to disagree that the dismissal of plaintiff's retaliation claims *necessarily* requires the dismissal of his retaliatory constructive discharge claim, this Court would alternatively find that the acts alleged by plaintiff fail to establish a constructive discharge as a matter of law.[7] *Martin v. Citibank, NA.*, 762 F.2d 212, 221 (2d Cir. 1985).

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6. The Court agrees with defendant that the dismissal of the retaliation claims in the prior case has collateral estoppel effect in this case.

7. For example, as discussed above at page 13, it appears from the timing of plaintiff's purported constructive discharge that the "last straw" that actually caused him to resign was not any of the alleged retaliation set forth above, but instead, was his belief that defendant had failed to pay his judgment creditors in connection with the settlement of his first lawsuit against defendant. That allegation is not part of this case, and it is the Court's understanding that plaintiff's belief in that regard was later shown to be mistaken.

Appendix E

CONCLUSION

Defendant's motion [#3] for summary judgment is GRANTED, plaintiff's cross-motion [#9] pursuant to Rule 56(f) is DENIED, and this action is DISMISSED.

SO ORDERED.

Dated: Rochester, New York
September 16, 2005

ENTER:

/s/ Charles J. Siragusa

CHARLES J. SIRAGUSA
United States District Judge [28]